INTERIM REPORT ON REVISION OF CHILDREN'S SERVICES ACT OF NOVA SCOTIA

BACKGROUND

During the debate on the amendments to the Children's Services Act introduced by the Minister of Community Services, and, in particular, during the presentations made to the Law Amendments Committee on May 11, 1988, the point was made that the Children's Services Act was now twelve years old and a more extensive revision of the Act was called for in light of the decision in Family and Children's Services of Kings County v. Dawson (1), and the introduction of the Canadian Charter of Rights and Freedoms, especially Sections 7 and 15. Accordingly, at the introduction of further amendments in the Committee of the whole House on May 24, 1988, the Minister announced that he had asked Professor Alastair Bissett-Johnson of Dalhousie University Law School to review the Act with a view to more extensive revisions being introduced in the spring of 1989. A wide range in consultation process was envisioned by the Minister in this process of revision, both before the submission of an interim report by Professor Bissett-Johnson by Labour Day 1988 and after release of the Report but prior to legislation being drafted by the Office of the Legislative Counsel for submission to the Legislative Assembly in the Spring of 1989.

PROCEDURE AND CONSULTATION

All Agencies and their lawyers, all persons or groups who had presented briefs to the Law Amendments Committee and certain interested professionals were asked by letter for written submissions by July 15, 1988. Consultations were held with 52 persons and groups. These are listed in an Appendix.

MATTERS OUTSIDE THE TERMS OF REFERENCE

A majority of the meetings and submissions referred to the question of resources. Those groups representing parents expressed the view that if, as Dalhousie Legal Aid suggested in their submissions to Law Amendments on May 11, 1988, 70% of the apprehensions of their clients' children involved neglect, it was not possible to divorce the Children's Services Act from Municipal and Provincial Social Assistance provisions. The Nova Scotia Association of Social Workers Report - "How are the Poor Surviving" makes a similar point. The government has started to address the variation in Municipal Assistance available to welfare families but the matter is one of continuing concern.

A recurrent theme in the submissions was the "Catch 22 situation" of parents being unable to seek the return of their children from care because they did not have adequate housing, and the unwillingness of some Social Assistance Authorities to grant a shelter allowance until the parent actually had obtained physical care of the children. Dalhousie Legal Aid wanted the introduction of a rule that where a parent is in receipt of Social Assistance or family benefits as a parent then such assistance or benefits should not be terminated where children have been apprehended until all appeals in the matter have been disposed of.

A majority of the Agencies expressed a desire to do more preventative social work but felt that with their present resources they could not undertake more work. The 1987 Task Force on Family and Children's Services recognizes this (p. 153 et seq.) but so far a number of its principal recommendations, including Recommendation 11.8 which recommended a reduction of the average caseload to 30 within 3 years, are still awaiting implementation.

The lack of crisis management facilities for teenagers, particularly unmanageable teenagers was a recurrent item mentioned in the context of a lack of resources.

The Atlantic Child Guidance staff raised the problem of a lack of resources for assessment of cases going to court. The Agency is now declining to deal with cases from outside Halifax-Dartmouth because of the size of its workload. In addition, the Agency pointed out the problem that, since the staff were private practitioners, a court had no power to order assessments to be done by a particular date or at all. A Court Clinic might cure this problem as well as building up expertise in forensic assessments. The Department of Psychiatry at the I.W.K. Children's Hospital supported the need for a Court Clinic.

A further problem involves the desirability of family court judges being able to order the removal of adults from premises in their continued presence could lead to a child being in need of protection. Unfortunately the Court of Appeal in Rudderham v. Rudderham, unreported June 15 held that this power is ultra vires a provincially appointed judge. It would be open to a Unified Family Court Judge to do this but this would require special legislation. The alternative would be to confer jurisdiction on Provincially appointed judge's by a constitutional amendment. Although the Zuber Report on the Administration of Justice in Ontario suggests that Provincially appointed judges be given increased powers over Family Law, if a constitutional amendment is involved, a speedy solution seems unlikely.

Finally, the extent to which child protection cases merit separate rules of evidence was raised by several lawyers who represent parents in such cases.

Although these matters are beyond the terms of reference of this review, they are worthy of consideration by those in Government whose responsibility they are.

COST OF IMPLEMENTING THE REPORT

The proposed philosophy of the Act is to implement what is now understood to be good social work practice. Compliance with this philosophy will require Agencies to provide the services necessary to implement the policy and to meeting the public's expectations. Although no new services are mandated by this report there may be some increases in costs.

It is also a matter of concern that a number of recommendations of the 1987 Task Force still await full implementation. Perhaps the most notable of these is Recommendation 11.8 that average case loads be reduced to 30 over a three year period although the starting money is in the budget for the 1988 Fiscal Year.

An increase in preventative social work to keep children out of care will produce some short term costs. But it may produce hidden savings to the system at a later date. The trauma to a child taken into care may show up at a later date in terms of costs to the Mental Health Budget incurred by the child or his or her parents.

THE ROLE OF LAW

In many ways law plays a very small part in the prevention of family dysfunction and within that small part, the legislation relating to child protection is a small part of a very large child welfare system and the workability of the legislation is, to a large extent, dependent upon the key players in the system understanding the legislation and having the resources available to make the legislation work. For example, because the Judiciary plays such a key role in interpretation of the legislation, it is important that persons who are appointed to the Family Court bench have the competence and capability to understand child welfare issues and to perform judicial functions. In addition, once appointed to the Family Court bench, regular and ongoing training and development is an integral part of insuring the viability of the bench and the workability of the Child Protection Legislation. Other key players in the child welfare system are child welfare agents who need also to be carefully selected and to have ongoing staff training and development to ensure they are performing their role competently, effectively and with sensitivity.

A holistic approach to child protection requires recognition of the fact that there are numerous services provided by other Departments of government such as Health and Education which interact with the child welfare system. These other governmental services must be co-ordinated and have the resources and the commitment to serving the best interests of children and assisting families in fulfilling their obligations to children.

Some of these matters will require attention in regulations and the development of policy subsequent to the adoption of legislation. It is vital, however, that those drafting the regulations and policy are sensitive to, and fully comprehend, the full range of legislation in this sphere.

At the same time, the development of a coherent unified legislative approach to children suggests that consideration should be given to producing a coherent piece of legislation in which as many of the laws relating to children can be put in one Act as in the Yukon. At present the custody and guardianship laws of this province are scattered over the Guardianship Act, the Family Maintenance Act, the Infants Custody Act and the Children Services Act, the Liberty of the Subject Act and the Judicative Act quite apart from the Federal Divorce Act.

PICKING AND CHOOSING FROM THE RECOMMENDATIONS

If a holistic approach to solving the problem of the needs of children is adopted, it is important to stress that there is a great deal of interrelationship between the provisions and many are dependent upon the existence of other provisions. It may, therefore, be important not to selectively accept certain provisions whilst rejecting others without carefully examining comparison recommendations or provisions.

PHILOSOPHY OF THE ACT

1. Role of the Family

Several witnesses at the Law Amendments Committee remarked that the title of the Children's Services Act seemed to neglect to focus on the fact that the welfare of the child is, for the most part, closely related to that of his/her family. This is not to deny that the interests of the family and child are not necessarily identical and that, in some cases, the State has a right to intervene to protect a child from harm and to place the interests of the child above those of the family. The witnesses suggested that there was important symbolism to including the family in the title of the Act as has been done in some other Provinces. Placing child before the Family in the title as in the Ontario Act is not without symbolic significance. (2)

RECOMMENDATION A

That the title to the Legislation be amended to "The Children and Family Services Act".

Related to this recommendation is the fact that nowhere in the Legislation is the policy about the placement of children overtly articulated in the Act. In fact, good social work practice is to retain children in their own family, or to reintegrate them into their families if they have been separated from them. The number of children in the care and custody of Agencies has been declining, for example from 2,511 on April 1, 1976 to 1,286 on April 1, 1986, but the perceptions are otherwise. Whilst the number of children in care and custody has declined, the age of the children has actually risen. (Figures taken from Social Services for Nova Scotians). In 1986 the biggest group of children in care were those between 15 and 19 (561 children out of 1284). Whereas in 1976 the biggest number was the group between 10 and 15 (895 out of 2441). Equally striking has been a decline in the number of younger children in care and custody. In 1986 only 90 children under 5 were in care and custody, whereas in 1976 the figure was 292.

Suggestions were made by parent's groups that Agencies were too willing to take children into care, and once in care, that children remain there far too long. If, as seems to be the case, Agencies are working to reunite families and to help them function better, and to only remove children from families or keep them in care where the best interests of children require this, this policy and a recognition of the importance of the family to society should be clearly spelled out in a preamble to the Act. Moreover the policy of the Department and Social Work Agencies to preserve families' unity where possible should be spelled out in substantive sections. It should also, however, be made clear that where the interest of parents and a child in need of protective services conflict, that the best interests of the child (as set out in the present s. 76) are paramount.

RECOMMENDATION B

That the importance of the family to society be recognized in a preamble to the Act and the policy of the Department of Community Services and Social Work Agencies toward practising rehabilitation and preventive social work towards preserving family unity, where possible, should be spelled out in an early section of the Act in terms similar to those of the Yukon Legislation. (3)

RECOMMENDATION C

That immediately after the sections based on the Yukon Act, the present s. 76 "best interests of the child" should be inserted.

2. Theories of State Intervention

Americans such as Mnookin (4), Wald (5) and Goldstein, Freud and Solnit (6) have articulated theories of family autonomy free from state intervention save in clearly articulated circumstances of (i) physical injury of a child (and a substantial likelihood that such injury is imminent); (ii) serious emotional damage to a child, evidenced by anxiety, depression, withdrawal or untoward aggressive behaviour toward others; (iii) sexual abuse; (iv) the withholding of medical treatment to cure, alleviate, or prevent a child from suffering serious physical harm causing death, disfigurement or substantial impairment of bodily functioning; or (v) a child committing delinquent acts as a result of parental encouragement, guidance or approval. Even where grounds exist for State intervention, it should be at a minimum level of intrusion necessary for a successful outcome - the least detrimental alternative. Such a theory makes for a reduced level of state intervention but, since it is restricted to the cases of most serious risk to the child, is the one, with proper drafting, which is least open to constitutional attack.

However, more intrusive interventions have been suggested by other authors (7) to cover neglect, failure to thrive, etc. In the light of the Charter, such interventions can only be made on the basis of clearly spelled out criteria if they are to escape constitutional attack. A choice exists as to how widely the grounds for intervention are to be cast beyond cases of physical, mental and emotional abuse and the criteria based on the Alberta or Ontario legislation mentioned in more detail later. If the decision to cast the legislation in wide terms is taken, then the provision is less likely to be left open to attack if possible Court and Agency intervention is limited, e.g., the child is to be left with the parent(s) and only compliance with court ordered conditions about assessment, treatment or training is sought(8).

3. The Role of the Charter of Rights and Freedoms (9)

Probably the most important change in the law since the introduction of the Children's Services Act in 1976 has been the Canadian Charter of Rights and Freedoms. Two provisions of the Charter, Section 7, and to a lesser extent, Section 15, are the most significant. Section 7 protects a person's life, liberty and security of the person. It seems from the Supreme Court of the Canada's decision, R. v. Morgantaler (10) that a parent's emotional and psychological well being may be invaded by the taking of their child into the care and custody of an Agency. Moreover, jurisprudence in the United States suggests that vagueness has been used as a constitutional basis for striking down imprecisely worded provisions and is likely to have impact in Canada (11). In the context of the Children's Services Act, this is likely to lead to a need to define "child in need of protection" in rather more closely defined terms than those of Section 2(m) of the present Act. Some of these issues were raised in the case of Daurie and Smith v. The Minister of Community Services et al argued in the County Court on June 6, 7, and 9, 1988 and decided August

17, 1988.

That same case raises the issue of whether serving Notices in respect of protection proceedings in a form which merely restates the working of particular subclauses of Section 2 of the Children's Services Act is sufficiently precise to meet the Charter requirement of "the fundamental justice".

There is also the possibility of Canadian Courts holding that, even though certain restraints on a person's rights infringe Section 7 of the Charter, that they can be demonstrably justified under Section 1 of the Charter as a reasonable restraint in a free and democratic society. However, any intervention that is excessive or out of proportion to the ill to be prevented, may nevertheless be struck down due to the overbreadth of the response. The party invoking Section 1 has the onus of showing that the means chosen are reasonably and demonstrably justified in a free and democratic society and a stringent standard of justification is required (12).

None of the appellate cases under the Charter have directly raised the issue of a conflict between the Section 7 rights of a parent and their child. In general, every right granted under Section 7 carries with it an obligation on society to accept the exercise of that right. However, the diminution of society's rights by granting of individual rights under Section 7 is a comparatively indirect diminution, and does not compare with the direct diminution of a child's own Section 7 right to life, security and freedom of the person by granting his parent a right to family integrity free from the risk of removal of their child.

In the United States (13) and, to some extent in Europe (14), the right to family unity and respect for family are said to have reached a constitutionally protected status. The position in Canada is less clear. Although in her dissenting judgement in R. v. Jones (11), Wilson J. talked of liberty as including the right "to marry, to establish a home and bringing up children." This was not, however, in the context of a conflict of interest between the rights of the parents and the child (16). Indeed, in the recent case of Little (17), Riche J. of the Unified Family Court stated that:-

> "With respect to family autonomy, a right claimed by counsel for the Little's, I am not sure that any such right exists. The members of a family have individual rights but I am not aware of collective rights. The parents have individual rights which they hold as members of society. With respect to their children, they have obligations or responsibilities. The parents have a right to custody of their children while they are children and for as long as they discharge their obligations to those children. The parents maintain a right to attempt to raise their children in the same religious faith as their's. As between the parents and the children, the parents have few rights and many obligations. The children have many rights and at infancy no obligations. The right that an infant child has, which is important to this case, is a right to be cared for by its parents. This is a right which

> I find is the right enshrined in the Charter under Section 7. The right to security of the person. This is a right which a person is not to be deprived of except in accordance with principles of fundamental justice. The right of the state or the Crown to interfere with the right of security of the person can only be exercised if it is in accordance with the principals of fundamental justice. In this challenge, it is not parental rights or family autonomy or even state rights, with which I am concerned, I am only concerned with the right to life, liberty and security of the child."

The language of Virtue J. in M. v. Director of Child Welfare (19) is to similar effect:-

> "In considering the right not to be deprived of life, liberty and security of the person, we are, in this case, speaking of the life of the infant child, S. It is her life that is at stake in these proceedings, not the parents'. The Child Welfare Act does not deprive S. of the right to life but protects that right; even to the extent of displacing, if necessary, the parents' right to ordinarily make medical treatment decisions for their child.
>
> Even if one were to accept the view that one of the liberty interests to be protected by s. 7 is the parental right to be free from state intervention as suggested in T. T. v. C.C.A. S. of Metro Toronto (1984), 46 O.R. (2d) 347, 39 R.F.L. of s. 7 'requires in some cases an obvious balancing of protected but competing rights' (p. 358). In the circumstances of the case before me, S.'s right to life must take precedence over any competing right of the parents where to do otherwise would seriously endanger her chance for survival." (19)

The problem in such cases is to identify the cases in which the general rule that "a child is best brought up in his or her own family" and in which group rights such as family rights, if they exist, and the right to privacy (20) apply, and those cases in which the parents and children's rights conflict. If they do conflict and this can be sufficiently demonstrated, there can be no doubt that intervention on the child's behalf is justified.

It is clear, however, that the more vague the language used as the basis for state intervention, the more intrusive the disposition of Courts and Agencies, the more open to constitutional objection they may become. Dispositions leaving children under the supervision of an Agency are easier to protect from constitutional attack than those terminating parents' rights. In either case, such decisions are more easily justified where there is clear and convincing evidence of a present threat to a child's life or health. Although Palmeter C.J.C.C. was unwilling in the Daurie and Smith Case to strike down the existing section 2 of the Children's Services Act under s. 7 of the Charter, it seems appropriate to consider revising the definitions of a child in need of protection in the light of other Provinces more recent experience.

In addition to Section 7, there is the possibility of the equality provision of Section 15 being used not merely to require the law to treat persons the same, but to, in effect, look at disadvantaged groups like the poor, women, native persons and to impose affirmative action to redress such disadvantages. In the light of Daurie and Smith one may expect the law to move cautiously in this area and not necessarily to accept, for example, that the greater percentage of Indian children in care is per se, evidence of a breach of Section 15. Although this issue has been rejected in the case of Daurie and Smith v. the Minister of Community Services, in view of the importance of the issues, is likely to be appealed to the Nova Scotia Court of Appeal and perhaps higher.

One aspect of Section 7 that requires special attention is the definition of parent in the Children's Services Act so as to exclude most fathers in unmarried relationships. This is likely to attract attack, especially in light of the financial obligations attaching to unmarried relationships (21). It would be an unreasonable burden to make Agencies trace fathers who have shown no concern or involvement in their children's lives either in terms of access, support or other involvement (22). However, the unconcerned father is not necessarily restricted to unmarried relationships as the statistics on default in support orders show (23). It should be possible to define those who are entitled to Notices of Child Protection proceedings or standing to participate in them (concerned parents) in terms of custody of, access to or support of a child in ways that do not infringe Section 15 of the Charter. The Yukon Act has already done so (24) and the Ontario Family and Children's Services Act draws no distinction between legitimate and illegitimate children (25) for questions of status.

RECOMMENDATION D

That the definition of "child in need of protection" within the present Section 2 be tightened to better comply with the Charter and that the term "child in need of protective services" be adopted to reflect the services available to protect the child at risk. Examples of the Alberta and Ontario definitions are appended. (26)

RECOMMENDATION D

That for the avoidance of doubt, it be stated that reasonable corporal punishment by a parent or guardian does not constitute a child being in need of protection. The Yukon provision is appended. (27)

RECOMMENDATION F

That the definition of parent in Section 2 of the Act be amended to include "concerned parents" who will be entitled to Notices of Hearings and granted standing in protection and adoption hearings.

4. THE LEAST CONFRONTATIONAL APPROACH

No intervention in a family is likely to be without some confrontation but subsequent dealings with a family are likely to be less difficult if the least confrontational means of initiating proceedings is used.

The Act should have a carefully graded system of options starting with voluntary services in the child's own home, moving to voluntarily taking children into temporary care for short periods and the court process should be seen as a last resort.

(a) Mediation of Problems (28)

Often in the course of dealings between a social worker and a parent or guardian concerning a child problems will emerge which, if they end up in court, will lead to expense, heighten the emotional heat of the case and be out of all proportion to the problem at hand. An agency for example might wish to know whether a parent has attended follow-up medical treatment for a child. The doctor might be unwilling to supply the information without a release from the parent which the parent might be unwilling to sign, fearing that the agency is trying to build a case for a court application. It might be possible to solve the problem by means of a joint application to have a neutral mediator who could help the parties reach a mutually agreeable solution. The mediator should be seen to be neutral, e.g. a behavioural scientist in private practice, and regulations would have to define the procedure in more detail, including methods of payment. Such a course, however, might be both cheaper than recourse to law and less confrontational. It should not, however, prevent cases going to court where this is necessary for the protection of a child.

RECOMMENDATION G

That an enabling procedure for joint-application of a mediator to solve problems in a form defined by regulation be adopted.

(b) Court Proceedings

The process of apprehending children and depriving parents of their rights (S. 45(3) is in many cases unnecessarily coercive, and in the past was due more to lack of clarity of the consequences of S. 44, prior to its recent amendment, and also to administrative consequences (the reimbursement of legal fees in such cases). In cases in which the most likely outcome is perceived by an agency and its lawyers as the return of a child to its parents subject to reasonable conditions and supervision by an Agency, it seems unreasonable to use "apprehension" to initiate proceedings.

RECOMMENDATION G

That procedures be strengthened to allow an application for a determination that a child is in need of protective services and for a court disposition without taking a child into care.

(c) Access

Access by parents to children (particularly to very young children) is essential to creating "bonding" and maintaining "attachment" between parents and child. However such access is not easy for agencies to arrange if foster parents live at a distance from the parents' place of residence, or if access has to be supervised. Recently debate has focused on whether the right to allow access is for the agency to determine as part of the parental rights it obtains under Section 45(3) or as part of its rights under an order for temporary care and custody. This was the former practice. More recently judges have been exercising a power to order access by parents (whether supervised or not) as part of their general power to divide up the bundle of rights that constitute custody. This question needs to be addressed by legislation, possibly as in Yukon, by granting the agency prima facie power to determine when and where access is to occur; but to give a right of appeal to a parent if the exercise of discretion is unreasonable. (29) A provision that the age of a child shall be a primary factor in determining the frequency and reasonableness of access (if this is appropriate) and whether it is being unreasonably withheld should be included. A judge should consider all reasonable methods of facilitating access, e.g., such as using reliable volunteers or members of the extended family to transport the child or to supervise access.

It should be incumbent on an agency to keep parents informed of the progress of children in the agency's care (30).

RECOMMENDATION I

That the detailed measures in the Draft Act be adopted to ensure that voluntary services are the initial method of solving problems and that where cases go to court "apprehension" of the child is seen as the last resort and that even then attempts are made to ensure appropriate contact between parent or guardian and child.

5. The Child's Sense of Time

Modern behavioral scientists such as Goldstein, Solnit and Freud have emphasized the difference between an adult's and a child's sense of time. The aim in child protection proceedings is to ensure that where possible a child is returned to its parents within a reasonable period of time with an acceptable chance of that relationship continuing on a long term basis.

When a child is in care time is rarely neutral, and hard decisions do not necessarily get easier to make over time. What is important is that a child is not left in a legal limbo for so long (and for a child under 3 it may be as little as three months) that or becomes scarred by the process, and if he or she becomes unplaceable. The case for a short concentrated initial effort to return a child to its family is better than lesser levels of efforts over a longer period.

The present 18-month time limit in Section 49 - adjournment for up to 6 months before a finding that a child is in need of protection plus a further adjournment for 12 months after such a finding - is too long for the young child and too short for the older child.

The new legislation should have a structure and time frame (flexible according to the age of the child) within which it is to operate.

Apprehension Cases

1. The first hearing should be held within 12 clear days and should be restricted to:
    (a) ensuring that the child and it parents or guardians have been properly served in connection with the proceedings in accordance with the Act;
    (b) determining on affidavit or viva vice evidence whether 'reasonable and probable' grounds existed for apprehending the child;
    (c) dealing with interim custody on the basis of a modified S. 49A of the existing Act; and
    (d) setting a date for the main protection hearing.

RECOMMENDATION J

i) That "hearing" be defined in S. 2 of the Act as "proceedings in which evidence is received by either affidavit (or similar evidence) or viva voce evidence as is deemed appropriate by the judge."

ii) That the purpose of an initial hearing in a case in which a child has been apprehended is

- a) to ensure that the child and its parents or guardians have received notice of hearing and particulars of why the child is in need of protection conforming to the Family Court rules;
- b) to determine race or religion;
- c) to determine whether reasonable or probable grounds existed for apprehending the child;
- d) to deal with interim custody in accordance with a modified S. 49A introduced by Bill 81;
- e) to set a date for the hearing to determine whether the child is in need of protection.

2. The hearing to determine whether the child is in need of protective services

This should be held within 2 months, or such longer period as is specified by the judge, (31) of the apprehension; but since it consists of two parts (the adjudicative stage - is the child in need of protection?) - and the dispositive part - (if the child is in need of protection what is the appropriate placement?), it is not necessary that this latter be completed within 2 months. (31)

RECOMMENDATION K

That the hearing to determine and find whether a child is in need of protection be held within 2 months (or such longer period as is specified by the Judge) of the service of the "notice to bring" or of the apprehension but that the final disposition of the case need not be completed within this period.

Other Cases

In the case of "notices to bring" or proceedings initiated without apprehension of the child, these should be the subject of an initial hearing within twelve clear days to see whether any assessments or other matters need to be dealt with, such as the disclosure of further particulars of why the child is alleged to be in need of protective services and whether the parents are to retain full parental rights, or merely care of the child. At that time a date would be set within two months, or such longer period as is specified by a judge for a hearing to determine whether a child is in need of protection. In the event of a finding that a child is in need of protection the court could make any of the orders it could make in an apprehension case, subject to the same time limits on the length of the proceedings as are applicable in apprehension cases starting from the time of serving the notice to bring, e.g. for children over six years, 18 months would be the maximum length of temporary care and custody or supervision. For children under six, the lesser length of proceedings applicable in apprehension proceedings would apply.

RECOMMENDATION L

i) **That in cases initiated other than by taking a child into the care and custody of an Agency an initial hearing be held with 12 clear days of service of the notice to bring or similar documents, to determine whether any assessments necessary to the subsequent hearing would be necessary and to ensure that all persons entitled to notices of hearing had received them together with particulars of why the child was alleged to be in need of protective services in a form sufficient to comply with the Family Court Rules together with a summary of the orders the court could make and a recommendation to seek legal advice. The Court should also determine whether parents should retain full parental rights**

pending a further hearing or whether the parents merely retain care of the child subject to the agency having temporary care and custody.

ii) At this initial hearing a date would be set for a further hearing within 2 months, or such longer period as is set by the judge, of that date to determine whether the child was in need of protective services. In the event of a finding at that hearing that a child was in need of protective services the court could make any of the orders it could make in a case initiated by apprehension of the child but subject to the same time limits governing the length of adjournment, temporary care and custody orders and supervision orders applicable in apprehension cases.

Court Powers

The Court's powers should be expanded to include a graded range of options starting with the least intrusive.

The least intrusive would be to leave the parents with full parental rights subject to reasonable terms and conditions and to supervision by an agency.

The next would be to introduce a new concept of temporary care to an agency with care to the child's prior care giver, in order to give the care giver a chance to implement a credible plan that he or she had placed before the court.

The next possibility would be to grant temporary care and custody to a third person (presumably a member of the child's extended family) subject to the imposition of reasonable terms and conditions and supervision by the agency.

The next would be, where appropriate, to grant custody to a third party, pursuant to the existing Section 67, which would be analogous to an order for care and custody to an agency.

Finally an order for care and custody could be made in favour of an agency thus freeing the child (if appropriate) for adoption.

RECOMMENDATION M

i) If a child was found not to be in need of protective services it should be returned to the person having prior care of the child, though time should be allowed by legislation (e.g. up to 48 hours as in Yukon (32) to prepare the child for a move from its current home.

ii) In the event of a finding being made that a child was in need of protective services, either at the time of apprehension or at the time of the court hearing (33), this finding should be recorded but a final disposition need not be made at this stage and a court could order the child

(a) into the care and custody of its prior caregiver subject to reasonable terms and conditions imposed by the court and supervision by an agency;

(b) into the temporary care of its prior care giver in order to allow that person time to implement a credible plan that he or she had placed before the court. The temporary care would be subject to the temporary care and custody of an agency under paragraph (e);

(c) into the temporary care and custody of a third person again subject to reasonable conditions and supervision by the agency, or, into the temporary care and custody of an agency;

(d) to grant custody of the child to a third person in accordance with the custody provision of the Act;

(e) into the temporary care and custody of an agency;

(f) into the care and custody of an agency either immediately or where, the parent, guardian or third party had been unable to bring their plan to fruition within the time allowed, at the expiry of the time allowed.

iii) In all cases the maximum length of such orders would be

- **(a) 6 months from the date of apprehension or notice to bring in the case of children under 3 years**
- **(b) 9 months for children under 6 and**
- **(c) 1 1/2 years in any other case;(34)**

iv) there should be a proviso that such periods could be extended with the consent of the parents and agency where this was in the best interest of the child according to defined criteria, or in any other case where the judge considered it was in the best interest of the child to do so. In any case, however, where the court was invited to extend the time limits the parties seeking to extend the limits would have to overcome a rebuttable presumption that the extension was against the best interest of the child.

v) there should also be power to extend the limits for further periods where a child over 12 requests this and where the Minister consents in writing - (such consent not to be unreasonably withheld).

vi) At the end of the time limits specified in the legislation a court would have to decide whether to return a child to its parents without conditions or supervision (though a voluntary agreement would be possible) or to make an order for permanent care and custody to an agency.

vii) Nothing in the above should preclude a Court from being able to make an order for immediate care and custody to an agency if circumstances so require.

Maximum Length of Proceedings

At the present time, though the maximum length of orders is 18 months (adjournment for up to six months and further year after finding that a child is in need of protection), by the time the appeal period is added on a child apprehended at birth may be in a legal limbo until the child is 2 1/2 years old. This has occurred (or is a possibility in some cases) and is unacceptable. This is not an implied criticism of the judges. The delays are in part due to the difficulty in getting transcripts of long cases in due time. In part it may also be due to a belief by lawyers acting for parents that time may work in in their favour - by enabling parents to improve their lifestyle or circumstances. At the end of a stipulated period varying with the age of the child, e.g. 6 months for a child under 3 years, 9 months for a child under 6 and 1 1/2 years in any other case, the child should either be returned to its parents or an order for permanent care and custody made.

The time limits should be made flexible to provide for extension by agreement between the agency and the parents and where this is in the best interests of the child. However there should be a presumption that those seeking to overcome the time limits would have to overcome. It would be presumed that extending the time limits is contrary to the best interests of the child. In order to prevent this exception becoming the rule, it may be necessary to provide that a judge give written reasons and state when it is in the child's best interest to extend the time limits. There should be power to extend the time limits for further periods in the case of older children. Where a child over 12 requests this and where the Minister consents in writing to the extension - such consent not to be unreasonably withheld. These provisions are based (though with shorter time limits) on S. 130 of the Yukon Children's Act.

RECOMMENDATION N

i) **that periods within which proceedings should presumptively be concluded be included in legislation**

ii) **these periods would vary with the age of the child and should be flexible enough to provide for extension by agreement between the parents and the agency concerned where this was in the best interest of the child or where a judge found this to be in the best interests of the child. There should, however, be a rebuttable presumption that the extension was not in the best interests of the child.**

iii) **A power to extend the period should also exist for a child over 12 years where the Minister consented to this - such consent not to be unreasonably withheld.**

Decisions

RECOMMENDATION O

Decisions should be handed down within 60 days of the date of last submission of material or the hearing in court whichever is the later.

Appeals

Legislation should also provide for the timely dispatch of appeals in child protection cases which should have a higher priority than they now have. In some cases children have been apprehended at birth but have reached 14 months of age prior to the judgement of the County Court hearing the appeal being delivered. If a further appeal is the Court of Appeal occurs, the child could be 2-2 1/2 years old before the appeals are disposed of. Even if the reduced time period mentioned previously are adopted, by the time the two appeal periods are added it may be over a year before permanent plans for the child can be made.

RECOMMENDATION P

In any appeal under the Act, the Appeal should be heard within 3 (three) months of the notice of appeal being taken out.

Layout of the Act

Many submissions have commented on the desirability of having an index to the Act as in Ontario, to having the Act drafted in language as comprehensive as possible to social workers and lay people to have a logical sequence to the Act.

RECOMMENDATION Q

That the Act have an index, a logical structure and, so far as possible in conformity, with legal clarity, be in language comprehensible to social workers and lay people.

Medical Consents

The recent developments in the Freeman case and the Newfoundland Unified Family Court decision in "In the matter of Little" (35) revealed two possible areas of reform:

(1) Cases in which an alleged unjustified withholding of parental consent to medical treatment on a very sick child is not challenged by a Children's Aid Society or similar authority within a reasonable time.

(2) Whether the law in cases which do reach court is compatible with the Charter.

In the Freeman case(36), a child suffering from leukemia underwent a round of chemotherapy at the I.W.K. Children's

Hospital, and then his parents, against medical advice, withdrew consent to further treatment, notwithstanding that the standard treatment, according to recognized experts, had a sixty percent chance of producing a two year or better survival rate. The Family and Children's Services of Kings County decided not to press ahead with taking the matter to court. Representations were made to the Minister resulting in the I.W.K. Hospital being granted the status of an agent under the Children's Services Act to take the matter before the Family Court. A date was set, but before the date, the child died.

In the Little case, a baby whose parents were Jehovah's Witness required urgent surgery. The parents would only give a conditional consent to the surgery, i.e., that no blood products were to be used during the surgery. Although a surgeon at the Janeway Hospital, Dr. Hannah, was prepared to operate subject to the parental conditions, no anaesthetist was prepared to accept the condition. In the face of that, the Director of Child Welfare, without notice to the parents, apprehended the child. Once the child was apprehended, the Director was, on the basis of the existing law, legally entitled to consent to surgery in lieu of the parents, that which he did. The operation was a success, and, in the event, no blood products were needed. Not until twenty days later, were the parents given notice of the court hearing to determine whether the child was in need of protection. The court case was not heard until approximately three months after the operation and, by that time, further surgery was necessary and this was done in Toronto. Although the operation was successful, tests revealed the child also had an inoperable heart condition from which he ultimately died almost one year after the original operation.

Notwithstanding the death, the court case continued and various defects were found in the Newfoundland Child Welfare Act (S. Nfld. 1972 #37, as amended), Sections 11 and 12:

i) Notice was not given to the parents within the ten day period referred to in the Act.

ii) The Act was silent about the situation where the child was returned to its parents before the case began or was completed or if the child was to die before or during the course of an investigation.

iii) The appeal period under the Act had run before the parents were notified of the apprehension of their child.

iv) It was held to be objectionable that the Director of Child Welfare should have been in a position to consent to the operation without having the basis for his intervention tested before a neutral third party such as a Judge.

Riche J. held that the conduct of the Director lacked sensitivity:

"I might add that had this matter been handled with some sensitivity for the religious beliefs of the parents, this

> challenge may have been avoided. This was proven later at the Hospital for Sick Children in Toronto where the parents were assured that blood would not be used unless it was absolutely necessary, even though Dr. Shandling retained the right to use it. The lack of consultation with the parents by the Director and the failure to obtain assurances from the surgical team did much to bring about a highly charged contest between the parents and the Director."

Such matters are important but not central to the content of legislation, though they may be relevant to government policy manuals. However, Riche J. compared the Newfoundland Act adversely to that of the Alberta Legislation.

> "The Child Welfare Act for the Province of Alberta, Chapter 81 of the Statutes of Alberta, 1984, requires that the Director apply to a Judge or a Justice of the Peace for an Order authorizing the Director to apprehend a child. Such an application can be made by the Director by telephone or other means of telecommunication. The Act also provides for apprehension without an Order of a Judge or a Justice of the Peace, where the child has been abandoned, lost or has no guardian, has left the custody of his guardian without the consent of the guardian, or the child's life or health is seriously or imminently endangered.
>
> Further, there is a requirement under the Alberta Act, Section 18, that the Director must notify the guardian of the child forthwith that the child has been apprehended. The Notice may be oral or in writing and must include a statement of the reasons for the apprehension and the rights of the guardian. Section 19 provides that the Director shall apply to the Court for a Supervision Order within two days after apprehension. That Section also provides that a Notice be given to the child if the child is twelve years of age or over. With respect to medical treatment, Section 20 provides that if the guardian of an apprehended child refuses to permit essential medical or surgical treatment as recommended by a physician, the Director must apply to the Court for an Order authorizing the treatment. If the Court is satisfied it is in the best interests of the child, it may authorize the treatment, notwithstanding the refusal of the guardian."

Riche J. also reviewed other Provincial Legislation which required hearings at an earlier date, e.g., Manitoba within four days, New Brunswick within five days or restricted to emergency cases the ability of the Director to consent to medical treatment.

After reviewing this Legislation and Section 7 of the Charter of Rights, Riche J. concluded that the Newfoundland Statute infringed the baby's (not his parents') rights.

> "With respect to family autonomy, a right claimed by counsel for the Littles, I am not sure that any such right exists. The members of the family have individual rights, but I am not aware of collective rights. The parents have individual rights which they hold as members of society. With respect to children, they have obligations or responsibilities. The parents have a right to custody of their children while they are children and for as long as they discharge their obligations to those children. The parents maintain the right to attempt to raise their children in the same religious faith as theirs. As between the parents and the children, the parents have few rights and many obligations. The children have many rights and at infancy, no obligations. The rights that an infant child has, which is important in this case, is a right to be cared for by its parents. This is a right which I find is a right enshrined in the Charter under Section 7, the right to security of the person. This is a right which the person is not to be deprived of, except in accordance with principals of fundamental justice. The right of the State or the Crown to interfere with the person can only be exercised if it is in accordance with the principals of fundamental justice. In this challenge, it is to parental rights of family autonomy or even State rights, with which I am concerned, I am only concerned with the right to life, liberty and security of the child.
>
> When baby Little was born, he immediately had the right to the protection of his parents. That includes the right to have them make all the decisions for him with respect to his health and well being. It was his right and his parents obligation. Baby Christopher Little had that right to parental care,

> including the making of decisions on his behalf with respect to his well being. This includes decisions as to what medical or surgical treatment he should be given. The right that Baby Little had to have these decisions made by his parents is his right."

Riche J. concluded that the Legislative scheme of Sections 11 and 12 could not be justified as a reasonable limit under Section 1 of the Charter because

> "I cannot see that the best interests and welfare of the child in this case and children generally would be lost if the parents were given notice of apprehension and the reasons therefore. Neither do I believe that consultation with the parents with respect to methods of treatment would have adversely affected Baby Little or other children, whether they be Jehovah's Witness or not. If the parents wish to oppose the apprehension on behalf of the child, that right can be exercised quickly by an application to a Judge. The Judge, as an impartial arbitrator, can make the appropriate decisions for the child."

Riche J. also asserted that in the case of a real emergency, the doctor does not require the normal consent for admission and treatment and would be protected from legal liability. He did not, however, hold that the parents' religious rights under the Charter were infringed since the child's right to life, liberty and security were higher rights.

RECOMMENDATION R

Since cases involving refusal of parental consent to medical treatment do not necessarily involve cases in which parental fitness are an issue, except to the limited extent of consent to medical treatment, the provision should be in a separate section of the Act from cases involving other allegations of a child being in need of protective services. An order, if granted, would only deprive parents of such parental rights as would be necessary to ensure proper treatment of the child. It may, however, be necessary to retain a "child in need of protective services" provision where parental consent is withheld for reasons unconnected with conscience.

In view of the Little decision, the provision should be modelled closely on the (Yukon or Alberta) Acts and provide, where possible, for the authorization for medical treatment to come from a Judge rather than the Director or a Children's Aid Society or similar functionary. Teleconferencing provisions should be provided in the statute to facilitate an early decision.

The Freeman case has raised the issue of whether, in cases in which parents are unwilling to consent to medical treatment which doctors have recommended is both urgently needed and is essential to a child's life or health, the Agency should be required to bring the matter before a Family Court Judge.

RECOMMENDATION 8

That Children's Aid Societies or similar societies be required, on receiving notice from the doctor at a designated hospital (such designation to be made by an Order in Council) that parents of a child are withholding consent to orthodox treatment of a non-experimental kind which is urgently needed and essential to the child's life or health, to bring the matter as soon as practicable before a Court and in any case before twenty-four hours. Teleconferencing provisions should be provided in the Statute to facilitate such a hearing.

[The I.W.K. Children's Hospital seems to be the most (and perhaps only) obvious candidate].

In the event that a Children's Aid Society declines to respond to the doctor's request, legislation should be enacted to require that the Children's Aid Society make its decision as soon as practicable, and in no case longer than twenty-four hours, and inform the doctors concerned immediately of that decision. In the event of the Children's Aid Society deciding not to take the matter before a Family Court Judge, the designated hospital should have standing to take the matter as soon as practicable before a Family Court Judge.

Granting grandparents or other family members' legal standing to raise the issue is not recommended as it is an unnecessary complication and may further exacerbate family relations, e.g., by resulting in the grandparents being denied access to their grandchildren.

RECOMMENDATION T

That in any case in which a child requires urgently needed treatment which is (i) essential to the child's life or health; (ii) in which the parents refuse to consent to; and (iii) in a case in which the Children's Aid Society or similar society refuses to take the matter before a Family Court Judge as soon as practicable (or in any case within twenty-four hours) after receiving notice (whether orally or in writing to this effect) from the child's doctor, that a hospital designated by Order in Council be granted standing to immediately take the matter before a Family Court Judge to get an Order authorizing the treatment of the child and restricting the parents' right to interfere with such treatment.

It may be that in some cases, the urgency of the occasion makes recourse to the Court even by a phone call impracticable, e.g., a need for an immediate blood transfusion. In such a case, medical witnesses have expressed a preference for a codification of the common law of necessity as expressed in the Little case as a defence.

RECOMMENDATION U

That for the avoidance of doubt, a residual subsection in the provisions relating to medical consents involving children whose parents withhold consent to treatment be included, stating that in any case in which recourse to the provisions for obtaining Judicial authorization to treatment are impractical, having regard to the urgency of the occasion, that a doctor who performs non-experimental treatment with due care in accordance with normal and acceptable medical practice shall be free from any liability for such treatment.

The following have been consulted about this recommendation: Drs. Anderson and Pysemany, I.W.K.; Mrs. Linda Smith, Head of Social work, I.W.K.; Mr. Dan Campbell, Cox, Downie, lawyer to I.W.K.

ALTERNATIVE APPROACH (LONG TERM)

An alternative view is that the question of medical consents involving children is not really a child protection issue to which social work principles and values are relevant. This view suggests that a separate Act, perhaps entitles, "An Act providing for the consents of minor children should be introduced by the Minister of Health and deal with questions such as

1) medical consents in the circumstances of cases like the Little and Freeman case

2) the question of whether a child of the age of sufficient understanding to understanding the treatment and consequences of such treatment can:

    i) give a consent to treatment contrary to the wishes of his parent or guardian or a person having similar powers (e.g. a C.A.S.) or

    ii) withhold consent to such treatment

If an immediate solution to cases like the Little or Freeman cases was required, the structure of responses provided amended in the Children's Services Act assuring that this issue was to be addressed would still hold good, with the omission of the first step of involving a Children's Aid Society. The question of whether a minor, of the age of discretion, could consent to or veto to treatment is more controversial and would require further study.

Detailed Amendments

The remaining recommendations have been set out with the bases for the recommendations on one side of the page, with (where applicable) a copy of the legislation from other Provinces opposite which might form the basis for drafting implementing provisions. It has been set out in the form of a draft Act to give a crude indication of how the Act might look if the recommendations were implemented. The crude draft Act will require considerable polishing by the Office of the Legislative Draftsman and readers are warned that the final "polished product" may read substantially differently from the present crude draft Act.

ENDNOTES TO PAGES 1-48

1) (1988) 12 R.F.L. (3d) 104 (N.S.C.A.).

2) Child & Family Services Act, S.O. 1984, c. 55, as amended.

3) S. 107 and 108 of the Children's Act of Yukon 1984 S.Y. c. 2 states as follows:

> 107(1) It is the policy of the Executive Council Member and the Director to supply services as far as is reasonably practicable to promote family units and to diminish the need to take children into care or to keep them in care.
>
> 108(1) For the implementation of the policy described in section 107, the Director shall take reasonable steps to ensure the safeguarding of children, to promote family conditions that lead to good parenting, and to provide care and custody or supervision for children in need of protection.
>
> 109(1) When practicable a child shall be placed with a family of his own cultural background and lifestyle preferably in his home community, but if such placement is not possible within a reasonable time the child may be placed in the most suitable home available.

4) R. Mnookin "Child Family & State" (Boston: Little Brown 1975, "Foster Care - In Whose Best Interest", 43 Harv. Ed. Rev. 599.

5) M. Wald, "State Intervention on Behalf of Neglected Children", 27 Stanford L.R. 986 and 28 Stanford L.R. 625.

6) 'Before the Best Interests of the Child', Free Press Paperback, 1979. See also in the context of divorce Hodges 'Interventions for Children of Divorce, Wiley. Interscience, 1986, ch. 3.

7) See Wald's articulation of the alternate point of view, ibid f.n. 5, 28 Stan. L. R. at 64 and 27 Stan. L.R. at 988. Wald mentions as examples of greater societal involvement in child rearing the kibbutzim in Israel. He also mentions Dr. Henry Kempe's views on periodic child screening to ensuring that children get "all available helping services" [paper presented to Harvard Inter Faculty Seminar on Child Rearing quoted in Light "Abused and Neglected Children in America", 43 Harv. Educ. Rev. 556 and 568. Wald assumed that failure to accept the offered services would have been regarded by Dr. Kempe as neglect justifying coercive intervention. See also Sanford Katz "When Parents Fail" (1971).

8) A child could be defined to be *in need of guidance* where the child's proper development was substantially and avoidably impaired owing to the neglect or culpable act or omission of the child's parent, *de facto* guardian or other care giver. A similar test for a *'family in need of guidance* could be adopted by substituting *family* for *child* in the second word of line one.

9) Constitution Act, 1982, Pt. 1.

10) (1988) 82 N.R. 1 (S.C.C.).

11) See D. Rollie Thompson "The Charter and Child Protection: The Need for a Strategy" (1986) 5 Can. Jo. of Family Law 68-69. See also N. Bala and Redfern "Family Law and the Liberty Interest", s. 7 of the Canadian Charter of Rights [1983] 15 Ottawa L.R. 274.

12) *R*. v. *Oakes* [1986] 1 S.C.R. 103.

13) Ibid., f.n. 11.

14) *Alsson* v. *Sweden* Case No. 2/1987/125/176. Reported in The Times Human Rights Law Report dated Monday, March 28, 1988. The breach by Sweden related to the placement of 2 of 3 children at long distances from the applicants homes had impeded access. The administrative problems behind the placement were insufficiently justified to the "necessary in a democratic society".

15) [1986] 2 S.C.R. 284 approving *Meyer* v. *State of Nebraska*, 161 U.S. 390 at 299.

16) The cases where group or family rights might be most expected to emerge are in immigration cases. Where the unification of a functioning family is sought or where a functioning family seeks to educate its children

outside the traditional school system.

17) Un-reported decision dated April 29, 1988 earlier proceedings are reported sub nomine, Re L (C.P.) 12.R.F.L.(3d)314 (Nfld.U.F.C.).

18) (1986) 4 R.F.L. (3d) 363 (Alta. Q.B.).

19) Ibid. at 377.

20) Analogized from the American Cases and Hunter v. Southam [1984] 2 S.C.R. 145 (S.C.C.).

21) E.g. A support obligation after living for one year as husband and wife, see s. 2 Family Maintenance Act, S.N.S. 1980, c. 6. See also the doctrine of the constructive trust in Sorochan v. S. [1986] 2 S.C.R. 38 noted Bissett-Johnson, 67 Can. B.R. 153-168.

22) The Ontario Divisional Court recently dismissed 'casual fornicators' from any right to an involvement in their children's adoption. Attorney General for Ontario v. Nevins 13 R.F.L. (3d) 113 (Ont. Div. CE). Unfortunately the court made no attempt to distinguish between concerned and unconcerned biological fathers.

23) See Finnbogason, E. and Townson, M. "The Benefits & Cost Effectiveness of a Central Registry of Maintenance & Custody Orders", Status of Women, Ottawa, 1985. F. Steele, "Government Policy & the Economics of Divorce" in Women, Law & the Economy, Butterworths, 1985.

24) See the definition of "concerned" in s. 106(1) of the Yukon Act:

> "concerned" in relation to parent means
>
> (a) a parent with the lawful care and custody of the child,

(b) a parent exercising rights of custody or of access in relation to the child, or attempting to exercise those rights,

(c) a parent providing financial support for the child, or

(d) a parent whose application respecting care, custody or access in relation to the child is before a court and awaiting adjudication;

25) S. 37(d)(ii) of the Ontario Act provides a test for establishing who is the biological father of a child. The whole definition of parent is reproduced below:-

> (d) "parent", when used in reference to a child, means each of
>
> (i) the child's mother,
>
> (ii) an individual described in one of paragraphs 1 to 6 of subsection 8(1) of the Children's Law Reform Act, unless it is proved on a balance of probabilities that he is not the child's natural father,
>
> (iii) the individual having lawful custody of the child,
>
> (iv) an individual who, during the twelve months before intervention under this Part, has demonstrated a settled intention to treat the child as a child of his or her family, or has acknowledged parentage of the child and provided for the child's support,
>
> (v) an individual who, under a written agreement or court order, is required to provide for the child, has custody of the child or has a right of access to the child, and
>
> (vi) an individual who has acknowledged parentage of the child in writing under section 12 of the Children's Law Reform Act,
>
> but does not include a foster parent;

26) Alberta Child Welfare Act

(2) [Interpretation: child in need of protective services]. - For the purposes of this Act, a child is in need of protective services if there are reasonable and probable grounds to believe that the survival, security or development of the child is endangered because of any of the following:

(a) the child has been abandoned or lost;

(b) the guardian of the child is dead and the child has no other guardian;

(c) the guardian of the child is unable or unwilling to provide the child with necessities of life, including failing to obtain for the child or to permit the child to receive essential medical, surgical or other remedial treatment that has been recommended by a physician;

(d) the child has been or there is substantial risk that the child will be physically injured or sexually abused by the guardian of the child;

(e) the guardian of the child is unable or unwilling to protect the child from physical injury or sexual abuse;

(f) the child has been emotionally injured by the guardian of the child;

(g) the guardian of the child is unable or unwilling to protect the child from emotional injury;

(h) the guardian of the child has subjected the child to or is unable or unwilling to protect the child from cruel and unusual treatment or punishment;

(i) the condition or behaviour of the child prevents the guardian of the child from providing the child with adequate care appropriate to meet the child's needs.

[39-902]

(3) [Interpretation: emotional injury; physical

injury; sexual abuse]. - For the purposes of this Act,

(a) a child is emotionally injured

(i) if there is substantial and observable impairment of the child's mental or emotional functioning that is evidenced by a mental or behavioral disorder, including anxiety, depression, withdrawal, aggression or delayed development, and

(ii) if there are reasonable and probable grounds to believe that the emotional injury is the result of

(A) rejection,
(B) deprivation of affection or cognitive stimulation,
(C) exposure to domestic violence or severe domestic disharmony,
(D) inappropriate criticism, threats, humiliation, accusations or expectations of or towards the child, or
(E) the mental or emotional condition of the guardian of the child or chronic alcohol or drug abuse by anyone living in the same residence as the child;

(b) a child is physically injured if thee is substantial and observable injury to any part of the child's body as a result of the non-accidental application of force or an agent to the child's body that is evidenced by a laceration, a contusion, an abrasion, a scar, a fracture or other bony injury, a dislocation, a sprain, hemmorrhaging, the rupture of viscus, a burn, a scald, frostbite, the loss or alteration of consciousness or physiological functioning or the loss of hair or teeth;

(c) a child is sexually abused if the child is inappropriately exposed or subjected to sexual contact, activity or behaviour.

(1987, c. 29, s. 6)

Ontario Child & Family Services Act

S. 37(2) Child in need of protection. A child is in need of protection where,

(a) the child has suffered physical harm, inflicted by the person having charge of the child or caused by that person's failure to care and provide for or supervise and protect the child adequately;

(b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (a);

(c) the child has been sexually molested or sexually exploited, by the person having charge of the child or by another person where the person having charge of the child knows or should know of the possibility of sexual molestation or sexual exploitation and fails to protect the child;

(d) there is a substantial risk that the child will be sexually molested or sexually exploited as described in clause (c);

(e) the child requires medical treatment to cure, prevent or alleviate physical harm or suffering and the child's parent or person having charge of the child does not provide, or refuses or is unavailable to consent to, the treatment;

(f) the child has suffered emotional harm, demonstrated by severe,

(i) anxiety,
(ii) depression,
(iii) withdrawal,
(iv) self-destructive or aggressive behaviour

and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

(g) there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to prevent the harm;

(h) the child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, treatment to remedy or alleviate the condition;

(i) the child has been abandoned, the child's parent has died or is unavailable to exercise his or her custodial rights over the child and has not made adequate provision for the child's care and custody, or the child is in a residential placement and the parent refuses or is unable or unwilling to resume the child's care and custody;

(j) the child is less than twelve years old and has killed or seriously injured another person or caused serious damage to another person's property, services or treatment are necessary to prevent a recurrence and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, those services or treatment;

(k) the child is less than twelve years old and has one more than one occasion injured another person or caused loss or damage to another person's property, with the encouragement of the person having charge of the child or because of that person's failure or inability to supervise the child adequately; or

(l) the child's parent is unable to care for the child and the child is brought before the court with the parent's consent and, where the child is twelve years of age or older, with the child's consent, to be dealt with under this Part.

27) S. 118(2) The mere subjection of a child to physical discipline does not bring the child within the definition of child in need of protection but the child may be in need of protection where the force is unreasonable or excessive, having regard to:

(a) the age of the child;

(b) the type of instrument, if any, employed in corporal punishment;

(c) the location of any injuries on the child's person;

(d) the seriousness of the injuries which resulted, or which might reasonably have been expected to result, to the child;

(e) the reasons for which it was necessary to discipline the child and any element of disproportion between the need for discipline and the amount of force employed

28) See Bernard Mayer (Colorado) "Conflict Resolution in child Protection and Adoption" in Conference Proceedings of Family Mediation Canada Banff, 1988, and Pearson J. Thoennes N., Golton M., Mayer B.,"Mediation of child Welfare Cases" Family Law Quarterly Vol. XX, No. 2 Summer 1986 p.303-322. See also Saskatchewan Bill 94 "The Child and Family Services Act" introduced June 1988 not yet passed ss 2(1)(h); 20; 40-43.

29) S. 138 of the Yukon Act states:-

(4) During the time between when a child is taken into care under this Part and when an order for permanent or temporary care and custody is made by a judge under this Part the Director shall have

(a) subject to subsection (5), power to determine who can have access to the child and upon what conditions, but the parent or other person who, but for the proceedings under this Part, would be entitled to access to the child, or to custody, or to care and custody of the child shall have reasonable access to the child with the consent of the Director, such consent not to be unreasonably withheld,

(5) A person who, under paragraph (2)(b) or (4)(a) is entitled to have reasonable access to the child and who alleges that the Director has unreasonably withheld his consent to access may apply to the judge for an order and the judge may make an order settling the terms and conditions of reasonable access by that person to the child.

29) 138 (3) During the subsistence of an order for temporary care and custody the Director shall, so far as is practicable, keep the concerned parents informed of the progress and situation of the child and discuss with them the future plans for the child.

30) See Yukon Children's Act, though note that in Yukon delay in the determination is not possible after a finding that a child is in need of protection.

S. 123(9) The hearing before a judge to determine whether a child is in need of protection and what order should be made in consequence of that determination shall be held and the determination shall be made within two months of the day of the hearing under subsection (5) is begun, unless the Director or a concerned party seeks a delay, and a judge is satisfied that the delay will not cause any prejudice to the best interests of the child and is necessary for the proper conduct of the hearing.

(It is suggested that the 2 month Yukon period be extended to 3 months to ensure that assessment reports are completed by the time of the main hearing.)

31) Note that the Yukon Act assumes both will be dealt with together.

32) See s. 128(2) and (3) of the Yukon Children's Act.

(2) Where, at the conclusion of the hearing set under subsection 123(6) and conducted under subsection 123(9), the judge finds on the balance of probabilities that the child is not a child in need of protection, the Director shall return the child to the concerned

> parent, or other person entitled to the child's care, in whose care and custody the child was when he was taken into care.
>
> (3) The Director shall return the child pursuant to subsection (2) so soon as the return may reasonably be done, having regard to the best interests of the child, but the return of the child shall not be delayed more than 48 hours unless a judge authorizes a longer delay.

A similar provision exists in relation to the return of a child if no reasonable and probable grounds exist for it being taken into care. S. 123(8).

33) It seems likely that in view of s. 49A (of the present Act as introduced by Bill 81) there will be an increase of marginal cases in which children will be returned to their parents. If these later break down, the earlier transcript should be admissible under s. 62 which should be recast in mandatory terms. S. 62 now reads:

> 62 At any hearing under this Act including a hearing on an application for termination of the care and custody of an agency, the judge may admit as evidence

(a) the record of the proceedings where the child or another child that was in the custody of one of the parties was found to be a child in need of protection;

(b) evidence taken by a commissioner appointed by a judge to take the evidence of a witness.

34) This is based on the Yukon Act, though with shorter periods for young children.

130 (1) No order for temporary care and custody of a child pursuant to section 128(1)(b) shall be, whether in consequence of adjournment, or of an initial order or any extension of an initial order, for a time exceeding,

(a) a period of 12 months, for a child under two years of age at the date of taking into care or of issuance of the notice to bring before a judge; or

(b) a period of 15 months, for a child under four years of age at the date of taking into care or of issuance of notice to bring before a judge; or

(c) twenty-four months in any other case.

(2) In calculating the continuity of periods referred to in paragraphs (a), (b) or (c) of subsection (1), the judge shall disregard any period or periods the aggregate of which does not exceed six weeks in which the child was temporarily returned to the care of his parents or other person entitled to his care and custody.

(3) Any order for temporary care and custody of a child pursuant to section 128(1)(b) that purports to be for a time exceeding the time allowed by this section shall be deemed to subsist for only the time that is allowed under this section.

(4) Notwithstanding the provisions of this section a judge may on the application of a child who has attained the age of 14 years and with the written consent of the Director, extend a period of temporary care and custody to the Director beyond two years for a further period not exceeding two years.

35) Created by adding the maximum period specified in the present s. 49

36) see f.n. 17 ante.

37) See Daily News between 7th and 19th of March, 1988.

GENERAL RECOMMENDATIONS

RECOMMENDATION A

That the importance of the family to society be recognized in a preamble to the Act and the policy of the Department of Community Services and Social Work Agencies toward practising rehabilitation and preventive social work towards preserving family unity, where possible, should be spelled out in an early section of the Act in terms similar to those of the Yukon Legislation.

RECOMMENDATION B

That immediately after the sections based on the Yukon Act, the present s. 76 "best interests of the child" should be inserted.

RECOMMENDATION C

That the definition of "child in need of protection" within the present Section 2 be tightened to better comply with the Charter and that the term "child in need of protective services" be adopted to reflect the services available to protect the child at risk. Examples of the Alberta and Ontario definitions are appended.

RECOMMENDATION D

That for the avoidance of doubt, it be stated that reasonable corporal punishment by a parent or guardian does not constitute a child being in need of protection. The Yukon provision is appended.

RECOMMENDATION E

That the definition of parent in Section 2 of the Act be amended to include "concerned parents" who will be entitled to Notices of Hearings and granted standing in protection and adoption hearings.

RECOMMENDATION F

That an enabling procedure for joint-application of a mediator to solve problems in a form defined by regulation be adopted.

RECOMMENDATION G

That procedures be strengthened to allow an application for a determination that a child is in need of protective services and for a court disposition without taking a child into care.

RECOMMENDATION H

That the detailed measures in the Draft Act be adopted to ensure that voluntary services are the initial method of solving problems and that where cases go to court "apprehension" of the child is seen as the last resort and that even then attempts are made to ensure appropriate contact between parent or guardian and child.

RECOMMENDATION I

i) that "hearing" be defined in S. 2 of the Act as "proceedings in which evidence is received by either affidavit (or similar evidence) or viva voce evidence as is deemed appropriate by the judge."

ii) that the purpose of an initial hearing in a case in which a child has been apprehended is

- **a) to ensure that the child and its parents or guardians have received notice of hearing and particulars of why the child is in need of protection conforming to the Family Court rules;**
- **b) to determine race or religion;**
- **c) to determine whether reasonable or probable grounds existed for apprehending the child;**
- **d) to deal with interim custody in accordance with a modified S. 49A introduced by Bill 81;**
- **e) to set a date for the hearing to determine whether the child is in need of protection.**

RECOMMENDATION J

that the hearing to determine and find whether a child is in need of protection be held within 2 months (or such longer period as is specified by the Judge)32 of the service of the "notice to bring" or of the apprehension but that the final disposition of the case need to be completed within this period.

RECOMMENDATION K

i) that in cases initiated other than by taking a child into the care and custody of an Agency that an initial hearing be held with 12 clear days of service of the notice to bring or similar documents to determine whether any assessments necessary to the subsequent hearing would be necessary and to ensure that all persons entitled to notices of hearing had received them together with particulars of why the child was alleged to be in need of protective services in a form sufficient to comply with the Family Court Rules together with a summary of the orders the court could make and a recommendation to seek legal advice. The Court should also determine whether parents should retain full parental rights pending a further hearing or whether the parents merely retain care of the child subject to the agency having temporary care and custody.

ii) At this initial hearing a date would be set for a further hearing within 2 months, or such longer period as is set by the judge, of that date to determine whether the child was in need of protective services. In the event of a finding at that hearing that a child was in need of protective services the court could make any of the orders it could make in a case initiated by apprehension of the child but subject to the same time limits governing the length of adjournment, temporary care and custody orders and supervision orders applicable in apprehension cases.

RECOMMENDATION L

i) If a child was found not to be in need of protective services it should be returned to the person having prior care of the child, though time should be allowed by legislation (e.g. up to 48 hours as in Yukon (32) to prepare the child for a move from its current home.

ii) In the event of a finding being made that a child was in need of protective services, either at the time of apprehension or at the time of the court hearing (33), this finding should be recorded but a final disposition need not be made at this stage and a court could order the child

(a) into the care and custody of its prior caregiver subject to reasonable terms and conditions imposed by the court and supervision by an agency;

(b) into the temporary care of its prior care giver in order to allow that person time to implement a credible plan that he or she had placed before the court. The temporary care would be subject to the temporary care and custody of an agency under paragraph (e);

(c) into the temporary care and custody of a third person again subject to reasonable conditions and supervision by the agency, or, into the temporary care and custody of an agency;

(d) to grant custody of the child to a third person in accordance with the custody provision of the Act;

(e) into the temporary care and custody of an agency;

(f) into the care and custody of an agency either immediately or where, the parent, guardian or third party had been unable to bring their plan to fruition within the time allowed, at the expiry of the time allowed.

(iii) In all cases the maximum length of such orders would be

(a) 6 months from the date of apprehension or notice to bring in the case of children under 3 years
(b) 9 months for children under 6 and
(c) 1 1/2 years in any other case;(35)

(iv) there should be a proviso that such periods could be extended with the consent of the parents and agency where this was in the best interest of the child according to defined criteria, or in any other case where the judge considered it was in the best interest of the child to do so. In any case, however, where the court was invited to extend the time limits the parties seeking to extend the limits would have to overcome a rebuttable presumption that the extension was against the best interest of the child.

(v) there should also be power to extend the limits for further periods where a child over 12 requests this and where the Minister consents in writing - (such consent not to be unreasonably withheld).

(vi) At the end of the time limits specified in the legislation a court would have to decide whether to return a child to its parents without conditions or supervision (though a voluntary agreement would be possible) or to make an order for permanent care and custody to an agency.

(vii) Nothing in the above should preclude a Court from being able to make an order for immediate care and custody to an agency if circumstances so require.

RECOMMENDATION M

i) that periods within which proceedings should presumptively be concluded be included in legislation

ii) these periods would vary with the age of the child and should be flexible enough provide for extension by agreement between the parents and the agency concerned where this was in the best interest of the child or where a judge found this to be in the best interests of the child. There should, however, be a rebuttable presumption that the extension was not in the best interests of the child.

iii) A power to extend the period should also exist for a child over 12 years where the Minister consented to this - such consent not to be unreasonably withheld.

DECISIONS

RECOMMENDATION N

Decisions should be handed down within 60 days of the date of last submission of material or the hearing in court whichever is the later.

RECOMMENDATION O

In any appeal under the Act, the Appeal should be heard within 3 (three) months of the notice of appeal being taken out.

RECOMMENDATION P

That the Act have an index, a logical structure and, so far as possible in conformity, with legal clarity, be in language comprehensible to social workers and lay people.

RECOMMENDATION Q

Since cases involving refusal of parental consent to medical treatment do not necessarily involve cases in which parental fitness are an issue, except to the limited extent of consent to medical treatment, the provision should be in a separate section of the Act from cases involving other allegations of a child being in need of protective services. An order, if granted, would only deprive parents of such parental rights as would be necessary to ensure proper treatment of the child. It may, however, be necessary to retain a "child in need of protective services" provision where parental consent is withheld for reasons unconnected with conscience.

In view of the Little decision, the provision should be modelled closely on the (Yukon or Alberta) Acts and provide, where possible, for the authorization for medical treatment to come from a Judge rather than the Director or a Children's Aid Society or similar functionary. Teleconferencing provisions should be provided in the statute to facilitate an early decision.

RECOMMENDATION R

That Children's Aid Societies or similar societies be required, on receiving notice from the doctor at a designated hospital (such designation to be made by an Order in Council)* that parents of a child are withholding consent to orthodox treatment of a non-experimental kind which is urgently needed and essential to the child's life or health, to bring the matter as soon as practicable before a Court and in any case before twenty-four hours. Teleconferencing provisions should be provided in the Statute to facilitate such a hearing.

* The I.W.K. Children's Hospital seems to be the most (and perhaps only) obvious candidate.

In the event that a Children's Aid Society declines to respond to the doctor's request, legislation should be enacted to require that the Children's Aid Society make its decision as soon as practicable, and in no case longer than twenty-four hours, and inform the doctors concerned immediately of that decision. In the event of the Children's Aid Society deciding not to take the matter before a Family Court Judge, the designated hospital should have standing to take the matter as soon as practicable before a Family Court Judge.

Granting grandparents or other family members' legal standing to raise the issue is not recommended as it is an unnecessary complication and may further exacerbate family relations, e.g., by resulting in the grandparents being denied access to their grandchildren.

RECOMMENDATION S

That in any case in which a child requires urgently needed treatment which is (i) essential to the child's life or health; (ii) in which the parents refuse to consent to; and (iii) in a case in which the Children's Aid Society or similar society refuses to take the matter before a Family Court Judge as soon as practicable (or in any case within twenty-four hours) after receiving notice (whether orally or in writing to this effect) from the child's doctor, that a hospital designated by Order in Council be granted standing to immediately take the matter before a Family Court Judge to get an Order authorizing the treatment of the child and restricting the parents' right to interfere with such treatment.

RECOMMENDATION T

That for the avoidance of doubt, a residual subsection in the provisions relating to medical consents involving children whose parents withhold consent to treatment be included, stating that in any case in which recourse to the provisions for obtaining Judicial authorisation to treatment are impractical, having regard to the urgency of the occasion, that a doctor who performs non-experimental treatment with due care in accordance with normal and acceptable medical practice shall be free from any liability for such treatment.

APPENDIX
CONSULTATIONS

CONSULTATIONS

JUNE, 1988

June 9 - Izaak Walton Killam Hospital
Dr. Allan Pyesmany, Dr. John Anderson, Mrs. Linda Smith

June 14 - Children's Aid Society of Halifax

June 15 - Directors of Children's Aid Societies and Family and Children's Services Agencies (informal luncheon)

June 16 - Judges of the Family Court

June 22 - Jean Swantko: Northeast Kingdom Church - further meeting July 26, as well

June 24 - Legislation Committee, Nova Scotia Family and Child Welfare Association

June 27,28&29 - Meetings Sackville District Office, Department of Community Services

JULY 1988

July 6 - Staff, Department of Community Services,

- Executive Directors, Children's Aid Societies and Family and Children's Services Agencies

July 7 - Atlantic Child Guidance Clinic, Dartmouth

- Nova Scotia Federation of Foster Parents Association

July 18 - Children's Aid Society of Lunenburg County

- Chief Judge Marshall Black, Family Court for the Province of Nova Scotia

July 19 - Mothers United for Social Transformation

July 26 - Jean Swantko

TELEPHONE CONVERSATIONS

Chief Judge Andrews: Family Court, Province of Ontario

Judge Nasmith: Family Court, Province of Ontario

Marvin Bernstein: Legal Counsel - Catholic Children's Aid Society of Metro Toronto

Nova Scotia Association of Black Social Workers (July 19)

Parents Rights Group - Parent Resource Centre (July 19)

Alison Butler: Barrister and Solicitor (July 20)

Joan Glode: Executive Director, Micmac Family and Children's Services Agency (July 20)

Moira Legere: Barrister and Solicitor, Nova Scotia Legal Aid (July 21)

Dalhousie Legal Aid (July 27)

Izaak Walton Killam Hospital: Department of Pediatric Psychiatry (July 28)

Gordon Kelly: Barrister and Solicitor, Children's Aid Society of Halifax (July 29)

Chief Judge Palmeter) several phone calls and personal
Chief Justice Clarke) meetings

WRITTEN SUBMISSIONS

Wayne Cochrane: Legal Counsel, Department of Health and Fitness

Federation of Foster Parent Associations of Nova Scotia

Children's Aid Society of Shelburne County

Nova Scotia Association of Social Workers

Adoptive Parents Association of Nova Scotia

John Langley: Barrister and Solicitor, New Glasgow

Children's Aid Society, Pictou County

Mothers United for Social Transformation

Family and Children's Services, Cumberland County

Nova Scotia Family and Child Welfare Association

Family and Children's Services of King's County

Barbara McPherson, Social Worker

Home of the Guardian Angel

Department of Community Services, Digby County

Jean Swantko

Micmac Family and Children's Services

Children's Aid Society of Lunenburg

Black Social Workers of Nova Scotia

Alison Butler, Barrister and Social Worker

Family and Children's Services of Annapolis

Stephen Mattson: Barrister and Solicitor, Nova Scotia Legal Aid, Kentville

Children's Aid Society of Halifax

Family and Children's Services, Yarmouth County

Department of Community Services, Johnston Building

Bernard La Montague, Chief Executive Officer, I.W.K. Children's Hospital

Gerry Gordon, Atlantic Child Guidance

Antigonish Diocesan Charities

WARNING

This draft Act is intended merely to give a crude idea of how the final act might look if the recommendations in this report were implemented.

Much polishing by the Legislative Counsel's office is necessary and the final "polished product" might look very different.

TO LEGISLATIVE DRAFTSMAN

THE AUTHOR HAS TRIED TO CHECK THE CROSS REFERENCING OF SECTIONS IN THIS ACT TO THE OLD ACT. A FURTHER CHECK WOULD BE DESIRABLE.

DATED: September 1, 1988

DRAFT CHILDREN & FAMILY SERVICES ACT

Preamble

WHEREAS the family exists as the basic unit of society, and its well-being is inseparable from the common well-being; and

WHEREAS the rights of children are enjoyed either personally or with their family; and

WHEREAS children have basic rights and fundamental freedoms no less than those of adults; a right to special safeguards and assistance in the preservation of those rights and freedoms and in the application of the principles stated in the Canadian Bill of Rights and elsewhere; and a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them and that they are capable of understanding; and

WHEREAS children are entitled, in every instance where they have rights or freedoms which may be affected by this Act, to be informed as to what those rights and freedoms are, where they are capable of understanding; and

WHEREAS it is recognized that the basic rights and fundamental freedoms of children and their families include a right to the least invasion of privacy and interference with freedom that is compatible with their own interests and those of their families and of society; and

WHEREAS it is accepted that parents have responsibility for the care and supervision of their children and that children should only be removed from parental supervision either partly or entirely when all other measures are inappropriate; and

WHEREAS it is acknowledged that when it is necessary to remove children from the care and supervision of their parents they should be provided for, as nearly as possible, as if they were under the care and protection of wise and conscientious parents; and

WHEREAS it is acknowledged that children have a sense of time that is different from that of adults, it is also further acknowledged that services provided under this Act and proceedings taken pursuant to it will respect the child's sense of time.

WHEREAS it is recognized that social services are essential to prevent or alleviate the social and related economic problems of individuals and families; and

WHEREAS it is recognized that the rights of children, families and individuals must be guaranteed by the rule of law and that the Province's intervention into the affairs of individuals and families so as to protect and affirm these rights must be governed by the rule of law:

RECOMMENDATION 1.

The title of the Act should be the "Children and Family Services Act" the purpose is to emphasize the role of the Family to Society.

EXPLANATION

This was the virtually unanimous view expressed in personal meetings with the author and written submissions to him.

RECOMMENDATION 2.

That a preamble similar to that found in the New Brunswick Act be adopted with the addition of a clause respecting the child's sense of time.

Sec. 1. [Short title] -- This Act may be cited as the Children & Family Services Act.

DEFINITIONS

Sec. 2 [Definitions] -- In this Act,

2 1(a) "agency" means the Minister or a Society incorporated under this Act'
(b) "agent" means a person appoint as agent of the Minister or of a Society pursuant to this Act;
(c) "applicant" means a person who applies for an order for adoption;
(d) "Board" means an Advisory Board appointed pursuant to Section 11;
(e) "care" means the physical care and control of a child;
(f) "care and custody" means all parental rights, duties and responsibilities toward a child;
(g) "child" means a boy or girl under sixteen years of age, unless the context otherwise requires;
(h) "child care services" means
    (i) assessment, counselling, referral, child protection and child placing services,
    (ii) voluntary care, homemaker, day-care and similar services,
    (iii) consulting, research and evaluation services with respect to child care services, and
    (iv) such other child care services as the Minister may from time to time approve or license as child care services;
(i) "child caring facility" means
    (i) a foster home,
    (ii) a licensed boarding home for a child under sixteen years,
    (iii) a group home,
    (iv) a place of safety,
    (v) a residential centre,
    (vi) a receiving home,
    (vii) a training centre,
    (viii) young offender facility, or
    (ix) such other facility as the Minister may approve or license as a child care facility
(j) "child in care" means a child who is in the care, or the care and custody of an agency;

(k) "child in need of protective services" means

that there are reasonable and probable grounds to believe that the safety, survival, security or development of the child is endangered because of any of the following:

EXPLANATION:

Mainly based on existing Act.

RECOMMENDATION 3.

The definitions of "child in need of protective services" and "parent" are tightened to comply with the Charter or Rights and Freedoms. The change from 'child in need of protection' to 'child in need of protective services' is based on the Alberta Act and emphasized the need of the child for protective services. All children are worthy of protection.

'after care officer' has been deleted from definitions - it is obsolete by reason of the Young Offenders Act.

(i) the child has been abandoned or lost;

(ii) the parent or guardian of the child is dead and the child has not other guardian;

(iii) the parent or guardian of the child is unable or unwilling to provide the child with necessities of life, including failing to obtain for the child or to permit the child to receive essential medical, surgical or other remedial treatment that has been recommended by a physician;

(iv) the child has been or there is a significant risk that the child will be physically injured or sexually abused by the parent or guardian of the child;

(v) the parent or guardian of the child is unable or unwilling to protect the child from physical injury or sexual abuse;

(vi) the child has been emotionally injured by the parent or guardian of the child;

(vii) the parent or guardian of the child is unable or unwilling to protect the child from emotional injury;

(viii) The parent or guardian of the child has subjected the child to or is unable or unwilling to protect the child from cruel and unusual treatment or punishment;

(ix) the condition or behaviour of the child prevents the parent or guardian of the child from providing the child with adequate care appropriate to meet the child's needs.

[Alberta Act .s.2]

(x) the child is less than twelve years old and has killed or seriously injured another person or caused serious damage to another person's property and services or treatment are necessary to prevent a recurrence which the child's parent or guardian or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, those services or treatment;

(xi) the child is less than twelve years old and has on more than one occasion injured another person or caused loss or damage to another person's property, with the encouragement of the person who has charge of the child or because of that person's failure or inability to supervise the child adequately;

EXPLANATION see p.4

(xii) the child's parent or guardian is unable to care for the child and the child is brought before the court with the parent's consent and, where the child is twelve years of age or older, with the child's consent.

(xiii) the child is staying away from his home in circumstances that endanger his or her safety or well-being; [Yukon Act s. 118(f)]

Ontario Act
Child and Family Services Act
1984 s. 55 s37(2)
Alberta Act

2(2) [Interpretation: emotional injury; physical injury; sexual abuse.] -- For the purposes of this Act,

(a) a child is emotionally injured

(i) if there is substantial and observable impairment of the child's mental or emotional functioning that is evidenced by a mental or behavioral disorder, including anxiety, depression, withdrawal, aggression or delayed development, and evidence of:
- (A) rejection; or
- (B) deprivation of affection or cognitive stimulation
- (C) exposure to severe or prolonged domestic violence or domestic disharmony; or
- (D) inappropriate criticism, threats, humiliation, accusations or expectations of or towards the child; or
- (E) the mental or emotional condition of the parent or guardian of the child or chronic alcohol or drug abuse by anyone living in the same residence as the child;

EXPLANATION see p.4

(b) a child is physically injured if there is substantial or observable injury to any part of the child's body as a result of the non-accidental application of force or an agent to the child's body that is evidenced by a laceration, a contusion, an abrasion, a scar, a fracture or other bony injury, a dislocation, a sprain, haemorrhaging, the rupture of viscus, a burn, a scald, frostbite, the loss or alteration of consciousness of physiological functioning or the loss of hair or teeth;

(c) A child is sexually abused if the child is inappropriately exposed or subjected to sexual contact, activity, behaviour or exploitation or the parent, or guardian fails to take reasonable steps to protect the child from being inappropriately exposed to such influences;

(d) the mere subjection of a child to physical discipline does not bring the child within the definition of child in need of protective services but the child may be in need of protective services where the force is unreasonable or excessive, having regard to:

  (a) the age of the child;
  (b) the type of instrument, if any, employed in corporate punishment;
  (c) the location of any injuries on the child's person;
  (d) the seriousness of the injuries which resulted, or which might reasonably have been expected to result, to the child;
  (e) the reasons for which it was felt necessary to discipline the child and any element or disproportion between the need for discipline and the amount of force employed [Yukon Act s.118.2]

(e) inadequate supervision

A child under 16 who is left without provision having been made for his or her supervision and care that is reasonable in the circumstances may be a child in need of protective services

EXPLANATION **see p. 4**

EXPLANATION

A few individuals and organizations favoured a recommendation that the mere fact of reasonable corporal punishment did not constitute a child being in need of protective services.

RECOMMENDATION 4.

That a provision similar to s. 118(2) of the Yukon Act be adopted to declare that the mere infliction of reasonable corporal punishment does not of itself make a child in need of protective services.

EXPLANATION

One group wanted a definition of inadequate supervision not merely for cases going to court but in order to be able to respond to requests for information with greater precision.

(f) The onus of proof of establishing reasonable supervision where the child under 12 shall rest on the parent or guardian and may include evidence of (or the lack thereof of)

- (i) the age and maturity of the child
- (ii) the length of time for which the child was unsupervised
- (iii) the accessibility of nearby help,
- (iv) the frequency of the alleged lack of supervision
- (v) the time of day
- (vi) the presence of young children in the child's charge

[based on Offence Section s.75 of Ontario Act)

(k) "child placing agency" means an agency, an institution or charitable organization approved by the Minister as a child placing agency;

(l) "concerned" in relation to parent means

- (a) a parent with the lawful care or lawful care and custody of the child
- (b) a parent exercising rights of custody or of access in relation to the child, or attempting to exercise those rights,
- (c) a parent providing financial support for the child, or
- (d) a parent who application respecting care, custody or access in relation to the child is before a court and awaiting adjudication;

[Yukon Act s.106]

(m) "county court" means the count court for a county court district and includes a judge thereof;
[Existing Act]

EXPLANATION

In order to distinguish between parents (especially fathers of illegitimate children) who had an automatic right to notices and standing in respect of hearings concerning their children and the right to consent the adoption of their children, and parents who had no such right and the involvement of whom would have been administratively burdensome, the concept of a "concerned" parent should be developed. See also the definition of parent in s. 2(v).

RECOMMENDATION 5.

That the Act develop, as did the Yukon Act s. 106, a concept of concerned parents who would be involved in proceedings relating to their children, rather than rely on the concept of legitimacy.

(n) "court" means the Family Court unless the context otherwise requires;

(o) "court officer" means a person appointed as a court officer pursuant to this Act;

(p) "custody" means actual or legal custody;

(q) "guardian" means a person who has the care or care and custody of a child but does not include a foster parent approved by an agency;

EXPLANATION - ESPECIALLY TO THE LEGISLATIVE DRAFTSMAN

The existing definition of guardian is retained and excludes most foster parents. Some foster parents or members of the child's extended family may have acquired custody of the child either under the custody or termination of care and custody of an agency provisions of the Act. The term 'lawful caregiver' was coined out of abundance of caution to describe such persons.

EXPLANATION

Although currently the Family Court dockets are very full, it has been suggested by the Department of Community Services that Family Court be given concurrent jurisdiction in adoption. If this proposal (which has resource implications), is adopted the change in definition of court will be required. There would probably be no constitutional problem since Family Courts presided by non-section 96 courts (i.e. presided over by provincially appointed judges) handle adoptions elsewhere e.g. Ontario. See also Re Ref Re Adoption Act [1938] S.C.R. 398.

Giving adoption jurisdiction to Family Courts has the functional attraction that such courts handle many of the cases by which children become available for adoption.

RECOMMENDATION 6.

That, subject to resource implications, the jurisdiction in adoption be shared concurrently between the Family and County Courts.

(r) hearing means proceedings at which affidavit (or similar) evidence or, with leave of the judge, viva voce evidence is considered;
[New]

(s) "judge" means a judge of the Family Court;

(t) "mentally handicapped child" means a child with significant below average general intellectual functioning which originates during the developmental period and is associated with impairment or either learning and social adjustment or maturation, or both;

(u) "Minister" means the Minister of Community Services;

(v) "parent" means

- (i) the mother of a child
- (ii) the father of a child
- (iii) the step-parent, and without prejudice to the generality of the foregoing may include
- (iv) [existing act]
  a male person, whether or not he is the father of a child, who is providing the chid with the necessaries of life and has resided with the mother of the child continuously for a period of one year immediately prior to the date of taking the child into care, or other initiation of proceedings
- (v) a female person who has resided with the father of the child continuously for a period of one year immediately prior to the date of taking the child into care, or other initiation of proceedings [Existing Act]

(w) "peace officer" means a member of the Royal Canadian Mounted Police, a police officer appointed by a city, town or municipality, sheriff, deputy sheriff or a person designated by the Attorney General;

(x) "regulations" means regulations made under this Act;

RECOMMENDATION 7.

That "hearing" be newly defined to fill a gap after Family and Children's Services of Kings County v. D.(E). (1988) 12 R.F.L.. (3d) 104 (N.S.C.A.).

EXPLANATION

Subclauses (iv and (v) of (v) may be unnecessary in view of the definition of "concerned" in relation to parent and 'guardian' as defined in the Act.

RECOMMENDATION 8.

That instead of the rights of a parent on whether the child is legitimate or illegitimate, that biological parents be entitled to parental rights PROVIDED that they have shown that they are a concerned parent. See also RECOMMENDATION 5.

(y) "Society" means a Children's Aid Society or a Family and Children's Services Agency incorporated under this Act;

(z) "special facility for children" means a facility designated as such by a Governor in Council either generally or specially.

(aa) temporary care and custody means the rights conferred by s. 2(f) subject to section 61(9) of this Act.

EXPLANATION

Existing Act

STATEMENTS OF PRINCIPLE

S.3 It is the policy of the Minister and the Director of Family and Children's Services to supply services as far as is reasonably practicable to promote family units and to diminish the need to take children into care or to keep them in care.

S.4 For the implementation of the policy described in Section 3, the Director of Family and Children's Services shall take reasonable steps to ensure the safe-guarding of children, to promote family conditions that lead to good parenting, and to provide care and custody or supervision for children in need of protective services.

S.5 Where practicable a child shall be placed in the company of his or her siblings, with (i) his extended family to whom he or she is related by blood, marriage or adoption; (ii) a family of his own cultural background, race and lifestyle, preferable in his home community, but if such placement is not possible within a reasonable time the child may be placed in the most suitable home available.

[Yukon Act s. 107-109 with minor amendments underlined]

S.6 (1) This Act shall be construed as if, and in all proceedings under this a court shall apply the principle, that the welfare of the child and it best interest are paramount; provided that no child shall be deemed to be in need of protective services merely because services could with advantage be extended to him.

[S. 76 of existing Act and Yukons 155 (1)(i)]

EXPLANATION

These are based on ss. 107-109 of the Yukon Act with the addition of the words underlined and give effect to the matters discussed at p. 13 et seq. of the Introductory part of this Report.

RECOMMENDATION 9.

That substantive provisions include a statement of the basis on which services are extended to families and the placement policy to be followed if children come into care.

RECOMMENDATION 10.

That S. 76 of the present Act be brought forward in view of its importance and that the factors constituting the best interest of the child be specified as per s. 132(1) of the Yukon Children's Act.

S. 6(2) In determining the welfare of a child and the child's best interests, the judge shall have regard to the following considerations relating to the best interests of the child:

(a) the bonding existing between the child, and its concerned parent or guardian, but not necessarily the bonding existing between the concerned parent or guardian and the child;

(b) evidence about who the child identifies and relates to as his parent or guardian;

(c) the length of time, according to the child's sense of time, that a child has been in care and the effect upon the child of any delay in the final disposition in the proceedings;

(d) the effect upon the child of any disruption of the child's sense of continuity;

(e) the child's right to be a wanted and needed member within a stable and secure family structure;

(f) the child's mental, emotional and physical stages of development;

(g) the risks and merits of the child returning to or remaining in the care of his concerned parent or guardian;

(h) the views and preferences of the child, where such views and preferences can reasonably be ascertained;

(i) any physical or psychological risk to the child of returning the child to, or allowing the child to remain in, the care of his or her parent;

(j) the mental, emotional and physical needs of the child and the appropriate care or treatment to meet those needs; and

(k) the race and cultural heritage of the child.

[Yukon s. 132 (1)]

RECOMMENDATION 11.

That the best interest of the child be defined in terms similar to s. 132(1) of the Yukon Children's Act in order to give greater guidance to the courts.

Sec. 7. That parents have the responsibility, within the limit of the resources available to them, of providing for the proper nurture and supervision of each of their children, for ensuring the proper development of each of their children so that each of their children feel a wanted and valued member of their family.

EXPLANATION

That the legislation mention the responsibilities as well as rights of parenthood.

RECOMMENDATION 12.

That the legislation emphasized the responsibilities as well as the rights of parenthood.

SERVICES

Sec. 8. [Duty of Minister]. -- (1) Subject to the regulations, where it appears to the Minister that

(a) there is no parent willing to assume responsibility for a child, or
(b) a child in care requires child care services or placement in child caring facility,

the Minister shall provide to the child appropriate services or placement.

(2) [Services available to persons from 16 to 21 years of age]. -- The Minister may provide the same services or placement to a person sixteen years of age or older but under the age of twenty-one years.

Sec. 9. [Minister to approve or license services]. -- (1) The Minister may approve or license child caring facilities and child care services for the purposes of this Act.

(2) [Necessity of approval] -- No person shall conduct, maintain, operate or manage a child caring facility or a child care service that is not approved or licensed by the Minister.

(3) [Foster home] -- Any foster home approved by an agency shall be deemed to have been approved by the Minister.

(4) [Suspension or cancellation of license]. -- Any approval or license given under this Act to any person or agency to conduct, maintain, operate or manage a child caring facility or child care service may be suspended or cancelled by the Minister.

(5) [Ministerial supervision] -- Any child caring facility or child care service maintained and conducted under this Act by the Province is subject to the supervision of the Minister.

Sec. 10. [Inspection]. -- The Minister or any person authorized by him to act on his behalf may enter a child caring facility or a place providing a child care service, and may inspect the facility or evaluate the service, and may examine the records of the facility or the service.

EXPLANATION: Based on existing law (ss. 3-5 inclusive)

Sec. 11. [Scope of ministerial power]. -- The Minister may maintain and conduct

(a) training centres and training of mentally handicapped children;

(b) young offender facilities and other special facilities for the care and training of children in need of special protection;

(c) residential centres;

(d) residential treatment centres for the care and treatment of emotionally disturbed children; and

(e) such other child care services or child caring facilities as the Minister approves for the proper carrying out of the Act.

Sec. 12. [Appointment of Advisory Boards]. (1) The Governor in Council shall appoint an Advisory Council to continually review and report at least once a year on the operation of the Act and possible Amendments for its better operation,

(2) The Governor in Council may appoint Advisory Boards for training centres, youth training facilities, residential centres and residential treatment centres, to assist and advise in the administration and conduct of the centres or facilities and to perform such other functions and exercise such powers as he prescribes,

(3) the agreement may make legally binding provisions between a parent or guardian and an agency concerning payment. [new based on S. 29 (8) Ontario],

(4) In addition, the agreement shall included terms relating to courses, treatment, training or counselling aimed at improving the family's functioning

(2) [Designation of chairman and members]. -- The Governor in Council may designate one member of each Board to be chairman and may prescribe the terms of office of members of each Board.

(3) [Remuneration]. -- The members of each Board shall be reimbursed for necessary and reasonable expenses incurred by them in carrying out their duties and shall be paid such allowances as the Governor in Council prescribes.

EXPLANATION

ss. 8-12 follow s. 3-7 of the existing Act except:

Regulations (or policy) should lay down the membership of the Advisory Committee to continually review the legislation as including:

- Chief Family Court Judge or nominee
- Executive Director of Children's Aid Society
- District Supervisor of Department of Community Services
- Director of Adoption, Department of Community Services
- Director of Child and Family Services
- A Paediatrician
- A lawyer
- Two persons appointed by the Minister
- Social Worker member of visible Minority
- Member of a Parents Rights Group

RECOMMENDATION 13.

That an Advisory Committee should be created to continually monitor the Act so that any successor in title to the author does not have to play 12 years catch up.

VOLUNTARY CARE

Sec. 13. (1) [Services provided to retain a child in its own home].--Amongst the services that the Department may (where practicable) offer under this Act are

(i) family/individual counselling, up to and including psychological and psychiatric services

(ii) teaching homemakers, S.O.S. service

(iii) drug/alcohol rehabilitation programs

(iv) day care or pre-school programs

(v) financial assistance programs

- Family Benefits
- Municipal Assistance

(vi) child management assistance programs

(vii) debt consolidation services

(viii) employment assistance programs

(ix) nutrition and health care programs

(x) Public Housing programs

(xi) planned parenthood

(xii) divorce mediation

(xiii) in-home support to handicapped

(xiv) parent support groups

(xv) parent effectiveness training

(xvi) in the case of services provided by Mic Mac Social Services, customary care as defined by this Act and the regulations thereunder

(xvii) such other services as may be added by regulation pursuant to this Act

RECOMMENDATION 14.

That legislation specifically indicate the services which the Department may offer (where possible) to a parent or guardian to keep a child in its own home and in order to diminish the need to take children into care.

Based on strong recommendations made by one of the groups representing family and children's services agencies/offices.

14 (1) [Voluntary Temporary Care outside the child's own home].-- Any parent or guardian

(a) who through special circumstances of a temporary nature is unable to make adequate provision for his child; or

(b) who is unable to provide the services required for his child because of the needs of the child,

may enter into an agreement with an agency to have the child placed under the supervision or care of the agency for the purpose of providing the services required to meet the needs of the child.

(2) the agreement may make legally binding provisions between a parent or guardian and an agency concerning payment for the cost of maintaining a child in temporary voluntary care [new based on s. 29 (8) Ontario].

(3) In addition, the agreement shall include terms relating to (where appropriate):

(i) courses, treatment, training or counselling aimed at improving the family's functioning;

(ii) A statement by all the parties to the agreement that the child's care is transferred to the society.

(iii) A statement by all the parties to the agreement that the child's placement is voluntary.

(iv) A statement, by the parent or guardian, that he or she is temporarily unable to care for the child adequately and has discussed with the society alternatives to residential placement of the child.

(v) An undertaking by the parent or guardian to maintain contact with the child and be involved in the child's care.

(vi) If it is not possible for the person referred to in paragraph 3 to maintain contact with the child and be involved in the child's care, the person's designation of another named person who is willing to do so.

(vii) The name of the individual who is the primary contact between the society and the parent or guardian.

RECOMMENDATION 15.

That the legislation more fully describes and defines the content and obligations (whether legally or morally enforceable) of a voluntary agreement and temporary help extended outside the child's own home.

EXPLANATION

It was suggested several times that voluntary agreement should be more specifically referred to (and their contents defined) in the Act as in s. 29 of the Ontario Child and Family Services Act, especially s. 29(8).

(viii) A statement, where applicable, of the parent or guardian's willingness to undertake courses, treatment, training or counselling aimed at improving the family's functioning.

(ix) such other clauses or matters as are prescribed by regulations.

(6) The termination of an agreement for voluntary care may only be made by giving (3) three clear days notice in writing.

Sec. 15 (1) A child between the age of 16 and 19 may, with the consent of his or her parent or guardian and an agency, enter into a voluntary care or supervision agreement with an agency to provide for his or her supervision or care by an agency.

(2) Such an agreement shall be legally binding and the child competent to make it unless it shall be proved that the child has insufficient understanding to make such an agreement.

(3) In any case in which a parent or guardian is unreasonably withholding consent to such a voluntary care or supervision agreement, either the agency or the child may seek an order dispensing with the parents consent.

(4) In deciding whether or not to dispense with parental consent a judge shall consider all the circumstances including:

(a) the ability of the parents to meet the child's reasonable needs

(b) the likelihood of the child residing with the parents if no order was made

(c) the risk to the child of not making the order sought.

Sec. 16. [One year limit].--(1) The term of an agreement under Section 15 shall not exceed one year.

(2) [Renewal of agreement]. -- Any such agreement may be renewed with the approval of the Minister.

EXPLANATION

Section 15 aims at permitting agreements between older children, who may be living away from home, their parents and an Agencies. Several submissions wanted this enabling legislation which has counterparts in s. 30(2) and 31 of the Ontario Act. Parental consent is normally required though it can be dispensed with if it is unreasonably withheld.

RECOMMENDATION 16.

That binding agreements between parents, children over 16 and Agencies be permitted.

Sec. 17. (1) [Child voluntarily given up for adoption].--The parent or guardian of a child may enter into an agreement with a child placing agency whereby the parent may voluntarily give up his child to the child placing agency for the purpose of adoption.

(2) (Notwithstanding any other provision in this Act) a biological father may enter into an agreement with a child placing agency to give up his child to the child placing agency for the purpose of adoption.

(3) [Custody application by biological father after birth of child] where a biological father of a child wishes to seek custody of a child voluntarily given up for adoption by its mother under S. 16(1) such father shall within 15 days of the birth of the child initiate proceedings for custody of the child under the custody provisions of this Act.

(4) [Timing and procedure under s. 16(4)] where such proceedings have been initiated under the Act, the matter shall be heard under this Act, and the matter shall be heard within 21 clear days and during such period no placement for adoption shall be made.

(5) [Rights of Agency under Agreement]--While an agreement is in force pursuant to this Section, the child placing agency named in the agreement, shall be the legal guardian of the child and as such shall have all the rights and powers of a parent and those that might be conferred upon a guardian under any act and the parent shall not have any parental rights, powers or responsibilities except those contained in this Act.

Sec. 18. [Termination of agreement by parent].--(1) Subject to subsection (2), where the child has not been placed in a home for the purpose of adoption the parent who entered into the agreement under Section 16, at any time during the term of the agreement, may notify the child placing agency that he wishes to terminate the agreement and have the child returned to him within 3 clear days.

(2) [Bar to termination].--Where a child has been placed in a home for the purpose of adoption as a result of an agreement under Section 17 and the person or persons with whom the child is placed have filed a notice of proposed adoption prior to the expiration of the term of the agreement, then, notwithstanding subsection (3), the agreement shall continue in force and shall not be terminated by the parent who entered into the agreement prior to an adoption order being made under this Act, unless and until the application for adoption is dismissed, discontinued or unduly delayed.

(3) [Term of s. 17 agreement].--The term of an agreement under Section 17 shall not exceed one year and, in the case of a new born child, shall not be effective until fifteen days after the birth of the child.

EXPLANATION

Existing s. 11 & 12 (except as amended see explanation on previous page) and for s. 17(5). Section 16(5) was recommended by the Department of Community Services. The purpose of s. 16(5) is to clarify the agency's legal authority to look after the child who is given up for adoption in the same way as an agency is authorized under Section 51 of the existing Act to do so. Section 18 is a strengthened form of the existing s. 12.

RECOMMENDATION 17.

That concerned parents should be given rights under the provisions relating to relinquishment for adoption and that enabling provisions be adopted to enable biological fathers to relinguish children for adoption.

Fathers who have not yet had the chance to exhibit their concern should be given a limited right to apply for custody of their new born child but not in a way that would significantly impede the adoption process. This provision should be read in the context of amendments to the custody provisions of this Act.

Section 17 is based on the old section 10 but involves concerned parents and an enabling provision to permit biological fathers to enter into agreements to relinguish children for adoption.

RECOMMENDATION 18.

That s. 17(5) clarify an agency's legal authority to look after a child relinquished for adoption. The agency's authority should be similar to that conferred by s. 51 of the existing Children's Services Act.

(4) [Renewal of Agreement].--Any such agreement may be renewed with the approval of the Minister.

(5) [Return of child to parent].--On receipt of notice under subsection (1) or failure to renew the agreement, the child placing agency shall return the child to the parent unless the child is found to be in need of protective services.

Sec. 19. [Parent to be notified when child placed for adoption].--For informational purposes, where a parent has entered into an agreement under Section 17, the Agency so far as is practicable keep the parent informed of the child's progress shall advise the parent when the child has been placed in a home for the purpose of adoption or provide such information upon request.

EXPLANATION: Based on ss. 10 and 11 of existing Children's Services Act.

ADOPTION

Sec. 20. [Age of adopting parent]--(1) Any person of the age of majority or more may, in the manner herein provided, adopt as his child another person younger than himself.

(2) [Joint application by man and woman]--Subject to this Section, if the applicant has a partner of the opposite sex who has been approved by an Agency is over the age of majority and is of sound mind, the partner shall join in the application.

(3) [No age requirement if applicant is parent of child to be adopted]--If the husband or wife of the applicant is a parent of the person proposed to be adopted, although not over the age of majority, he or she may join in the application.

(4) [Parent not required to join]--The husband or wife of the applicant if he or she is also the legitimate parent of the person proposed to be adopted, need not join in the application, and in that case the relationship of such husband or wife or of his or her kindred with the person proposed to be adopted shall continue and be in no way altered by any order for adoption made in favour of the applicant, who shall become the other parent of the person proposed to be adopted by such an order.

(5) [Death of applicant]--Where one of the applicants for an adoption dies after notice of the proposed adoption has been given to the Minister, the surviving applicant may proceed with the application and an order for adoption by him alone may be made.

(6) [Consenting party may adopt]--A person whose consent to an adoption is required by this Act is not prohibited from becoming a parent by adoption of the person in respect of whom he has given consent to adopt.

Sec. 21. [Minister to be informed of intention to adopt]--(1) Every person who receives a child from another person for the purpose of adoption shall within ten days of such reception inform the Minister.

Sec. 22. (1) Every person, other than one related to a child by blood or marriage, who intends to receive a child from another person for the purpose of adoption shall give to the Minister at least three clear days notice of this intention to receive the child; such notice may be given prior to the birth of the child. [Aims at implementing (Recommendation 8.8, p. 111 of the 1987 Task Force].

EXPLANATION [Basically existing s. 13 & 14 of existing Act]

The amendment to the existing s. 19(2) [new 20(2)] aims at preventing a charter challenge by joint applicants who are not married but who otherwise are acceptable applicants. Ontario has changed its policies to comply with the Charter. s.15 of the Charter probably prevents discrimination on the basis of sex and s. 1 would probably not save the other breadth response. The saving is that relatively few unmarried applicants are acceptable to agencies who would retain the right to determine who was a suitable applicant. The adoption policy of agencies wishing to follow this change might specify a stable common law marriage of at least 2 years duration as complying with the policy.

RECOMMENDATION 19.

That enabling provisions be enacted to permit joint applications to adopt from people who agencies determine (according to their own policy) are suitable adopters.

EXPLANATION

Section 21 Aims at implementing Recommendation 8.8 (p. 111) of the 1987 Task Force to ensure that a check on adopters who are obtaining a child for the purpose of adoption, other than through an agency, is made prior to rather than after the child reaches the would be adopter's home. It is not envisaged that as full a check would be made as those made of adopters who obtain a child from an agency. The policy manual will determine the types of search to be made. See also s. 22(1)(d).

RECOMMENDATION 20.

That s. 21(1) be amended to implement the notice requirements in relation to Private Adoptions recommended by the 1987 Task Force. (Recommendation 8.8, p. 111 of the Task Force Report.)

(2) [Person receiving child is child's mother].--Subsection (1) does not apply where the person who receives the child is the mother of the child.

(3) [Payment of money re adoption an offence].--Any person who gives or receives or agrees to give or to receive any payment or reward directly or indirectly

(a) in consideration of the placement for adoption of a child; or
(b) to procure a child for the purpose of adoption,
(c) for the surrender of parental rights or care or custody of a child

is guilty of an offence and on summary conviction is liable to a fine of not more than two thousand dollars or to imprisonment for a term of not more than one year, or to both.

(4) Where the best interests of a child may be served by granting a child care subsidy to the adopting parent of the child, the Director may authorize payments, from time to time and upon such terms and conditions as may be prescribed, of such amounts as are necessary for such purposes. [Based on S. 99(1) of Yukon Act. Recommendation based on 8.3 of the 1987 Task Force Recommendations.]

Sec. 23. [Restrictions on placement].--(1) No person shall place or receive a child for the purpose of adoption unless

(a) any necessary consent for adoption has been obtained and, if necessary, confirmed;

(b) each person who has consented to the adoption has, before giving the consent, received professional counselling by a person or a member of a class of persons approved for that purpose by the Minister;

(c) a social and medical history respecting the natural parents has been prepared, if the parents or either of them are known and available, by a person or a member of a class of persons approved for that purpose by the Minister; and

(d) prior to the placement of the child in the home s. 21 (1) has been complied with.

EXPLANATION

All sections based on existing Act except for (i) s. 22(4), which aims at implementing the 1987 Task Force Recommendation 8.3 in a form used in the Yukon Act, (ii) s. 23(d) which implements the Task Force recommendation of prior approval of homes where third party placements are involved. (Recommendation 8.8.) and (iii) s. 22(3)(c) which strengthens the existing law.

RECOMMENDATION 21.

That subsidized adoption in an enabling, but not mandatory form, be given statutory recognition. This implements recommendation 8.3 of the 1987 Task Force in a form based on s. 99(1) of the Yukon Act.

RECOMMENDATION 22.

That prior approval of homes whose third party placements be required in accordance with Task Force Recommendation 8.8.

RECOMMENDATION 23.

That payment of money (or its receipt) for the surrender of parental rights or care or custody or a child be made an offence.

except where

(e) the child is placed by a child placing agency;

(f) the child is placed by the mother or father with a person related to either the mother or father by blood or marriage;

(g) one of the applicants for adoption is a natural parent of the child.

(2) [Offence].--A person who places or receives a child for the purpose of adoption and who does not comply with subsection (1) is guilty of an offence and on summary conviction is liable to a fine of not more than ten thousand dollars or to imprisonment for a term of not more than one year, or to both.

Sec. 24. [Application to be made in county court [family court]].--(1) Where the applicant resides in the Provinces, the application for adoption shall be made to the county court or [family court] in the county in which the applicant resides.

(2) [Where applicant does not reside in the Province].--Where the applicant does not reside in the Province, the applicant shall be made to the county court or family court in the county in which the person proposed to be adopted resides.

(3) [Where neither applicant nor person to be adopted resides in Province].--Where neither the applicant nor the person proposed to be adopted resides in the Province,

(a) if either one is domiciled in the Province, the application may be made to the county court in any county or the family court for that county; or

(b) if the person proposed to be adopted is a child in care of an agency, the application may be made to the county court in the county where the agency is located or the family court in that county; or

(c) if the person proposed to be adopted was born in the Province, the application may be made to the county court in the county where that person was born.

(4) [Application to be heard by county court [or family court]].--An application for adoption under this Act may be presented to and heard by the county court [or family court].

EXPLANATION

It has been recommended that concurrent jurisdiction be given to family court in adoption. The author only recommends this course, in view of the existing pressure of work in family court, if the Chief Family Court Judge recommends it. If this course is adopted the words underlined and in brackets need to be added to s. 24.

RECOMMENDATION 23A.

That Reg. 3A should be amended to include first cousins within the definition of a person related to the mother or father by blood or marriage.

RECOMMENDATION 24.

That, if the Chief Family Court Judge determines that the court can accept the work within its existing work load, the family court be given concurrent jurisdiction over adoption.

(5) [Applicant represented by barrister of Supreme Court].--Where the applicant is represented by a barrister of the Supreme Court designated by the Minister or employed in the Department of Social Services the application for adoption may be made to the county court in any county or to any judge thereof.

(6) [Order confirmed].--No application or petition presented or proceedings had or powers or authority exercised or findings made or order for adoption made heretofore under this Act shall be held invalid or ineffectual by reason of the same having been made by a judge of the county court and not by the county court.

Sec. 25. [Consent of child over 12 years].--(1) Where the person proposed to be adopted is twelve years of age or older and of sound mind, no order for his adoption shall be made without his written consent.

(2) [Where person to be adopted married].--Where the person proposed to be adopted is married, no order for his adoption shall be made without the written consent of his spouse.

(3) [Written consent of parents where child under age of majority and not in care].--Where the person proposed to be adopted is under the age of majority and is not a child in care and custody of an Agency, no order for the child's adoption shall be made, except as herein provided, without the written consent to adoption of the child's concerned parents, legal guardian or any person entitled to the lawful custody of the child, which consent may not be revoked unless the court is satisfied that the revocation is in the best interests of the child.

(4) Where a father is a concerned father as defined by this Act, he shall be informed of a person's intention to file a notice of proposed intention to adopt a child.

(5) The father of an illegitimate child may file with the Minister a notice requesting that he be informed of a person's intention to file a notice of proposed adoption with regard to his child.

(6) The notice shall contain his address, his telephone number and other particulars as may be required by the Minister.

(7) Where an agency is informed in writing of a person's intention to file a notice of proposed adoption with regard to an illegitimate child and the father of the child has filed a notice pursuant to subsection (5), or is a concerned father, the agency or the Minister shall, within seven days, serve notice of such intention upon the father.

EXPLANATION

Basically existing act s.24(3)

Section 25(3) aims at ensuring that fathers of illegitimate children have a mechanism for contesting the adoption of their child. s. 24 -(5)-(7) is based on a Department of Community Services draft dated January 28, 1988. Subsections (5)-(10), like subsection (3), aim at providing a mechanism for involving the fathers of illegitimate children. Concerned fathers, as defined in this Act, are to be parties whose consent is needed for the adoption of their child (or for it to be dispensed with). Illegitimate fathers under subsection (5)-(12) merely have the right to file their name and to launch custody proceedings but their consent to adoption is not necessary.

RECOMMENDATION 25.

That concerned parents' consents be required for the adoption of their children and that biological fathers who have registered their names be permitted to launch custody proceeding within a limited time.

(8) The father shall have 15 days from the date of receipt of the notice referred to in subsection (6) to make an application to have the custody of the child determined.

(9) The court shall hear the application within 15 clear days from the date it is filed.

(10) Where a notice has been filed pursuant to subsection (5), a notice of proposed adoption may be filed only

(a) if the father fails to make an application for the determination of the custody of the child pursuant to subsections (8) and (9);

(b) where custody is not granted to the father,

  (i) after the expiration of the time for appeal from an order for care and custody, or

  (ii) after the final disposition of an appeal.

(11) Subsections (5) - (10) do not apply where the child is a child in the care and custody of an agency.

(12) For the purpose of Subsections (5) - (10) inclusive, service of the notice by the agency or the Minister to the biological father is good and sufficient if it is mailed, postage prepaid, by registered letter to the last known address of the biological father or is delivered to that address.

(13) [Requirements for validity of consent].--A written consent to adoption referred to in subsection (3) shall have no force and effect unless it is given

(a) not less than fifteen clear days after the birth of the child; or

(b) before the birth of the child and the person giving the consent confirms it in writing not less than fifteen clear days after the birth.

(5) [Exceptions].--Subsection (4) does not apply

(a) where the child is placed for the purpose of adoption by the mother or father with a person related to either the mother or father by blood or marriage;

(b) where one of the applicants for adoption is a natural parent of the child; or

(c) to an agreement under Section 17.

EXPLANATION EXISTING ACT

See previous page

EXISTING ACT

(14) [No remedy where promise to give consent broken].--No action may be taken and no damages may be awarded against a person who does not give a consent or confirm a consent for adoption notwithstanding any representation by the person that the consent or confirmation would be given.

(15) [Child in care and custody].--No order for the adoption of a child in the care or custody care of the Minister shall be made without the written consent of the Minister and no order for the adoption of a child in care of a Society shall be made without the written consent of the Society or the Minister.

(16) [Consent of Society or Minister].--Subject to subsection (1) and pursuant to subsection (4), when a child proposed to be adopted is a child in the care and custody of an Agency, the written consent of the Society or the Minister is the only consent required.

(17) [Consent of child placing agency].--Where a child has been given up for the purpose of adoption pursuant to Section 16, the child placing agency to which the child has been given is entitled, while the agreement is in force, to give any consent that otherwise may be given by or is required from a person executing the agreement, and, while the agreement is in force, the person executing the agreement is not required or entitled to give any such consent.

(18) [Consent where child under age of majority and not resident in Province].--Where the person proposed to be adopted is under the age of majority and does not reside in the Province or was brought to the Province for the purpose of adoption, the written consent referred to in subsection (3) may be given by the officer or person who under the law of the province, state or country in which the child resides or from which the child was brought may consent to his adoption.

(19) [Parent under age of majority].--Where the parent of a child is under the age of majority, he may, not withstanding his age,

(a) consent to the adoption of the child; or
(b) enter into an agreement pursuant to Section 17.

(20) [Adoption final].--No legitimation subsequent to an adoption, whether before or after this Section comes into force, shall invalidate or affect the adoption.

EXPLANATION

S. 25 (15), (16) and (17) are amended to incorporate Reg. 25 which is the Act, ultra vires and was introduced in an attempt to save a drafting error in the old s. 16(4).

RECOMMENDATION 26.

That legislation make it clear that the consent of the Minister or of an Agency in relation to adoption be restricted to cases where the agency has the care and custody but not care or temporary care and custody of a child.

Sec. 26. [Consent dispensed with].--(1) Where the county court [or family court] is satisfied that a person whose consent is required under subsection (2) or subsection (3) of Section 24

(a) is dead;
(b) is of unsound mind;
(c) is missing or cannot be found;
(d) has deserted or neglected to provide proper care and maintenance for the child;
(e) has suffered the child to be supported for more than two years continuously next preceding the date of the application by a child placing agency;
(f) is divorced and neither has custody nor is contributing to the support of the child at the time of the application; or
(g) is a person whose consent in all circumstances of the case ought to be dispensed with,

the county court [or family court] may order that this consent be dispensed with, if it is in the interest of the person to be adopted to do so.

(2) [Confirmation of consent dispensed with].--A confirmation of a consent required by subsection (13) of Section 25 may be dispensed with by the county court in the same manner and circumstances as the county court may dispense with a consent.

Sec. 27. [Notice to be given to person whose consent to be dispensed with].--(1) Where the applicant seeks to dispense with the consent of any living person, he shall give that person notice of the time and place of the adoption hearing with a copy of the application and all material proposed to be used in support of it not later than one month before the hearing of the application, by personal service of the notice and copy or, if the person cannot be found, by substituted service in such manner as the county court orders, and in any case the county court may require such additional notice or consent as it considers proper.

(2) [Deemed consent].--Any person served pursuant to subsection (1) who does not appear at the hearing of the application and object to the adoption shall be deemed to have consented to the adoption.

EXPLANATION: Existing Act

Sec. 28. [Notice to Minister when child under 16].--(1) Except as herein provided, where the person sought to be adopted is under the age of sixteen years, the county court or [family court] shall not make an order for his adoption unless

(a) notice of the proposed adoption has been given to the Minister not later than six months before the application to the county court for an order for adoption; and

(b) notice of the hearing of application and a copy of the application and all material to be used in support of it have been filed with the Minister not later than one month before the date of the application; and

(c) the child sought to be adopted has for a period of not less than six months immediately prior to the application, lived with the applicant under conditions that, in the opinion of the county court, justify the making of the order.

(2) [Variation of period of notice or residence by Minister].--The Minister may, by certificate in writing, shorten the length of any notice or the period residence required by subsection (1) or dispense with any notice or period of residence.

(4) [Stay of notice pending appeal].--In the case of a child who is a child in the care of an agency, the notice of the proposed adoption shall not be given until any appeal from the committal of the child to the care and custody of an agency or from a decision granting or refusing an order to terminate the care and custody of an agency is heard and finally determined or until the time for taking an appeal has expired.

Sec. 29. [Applications held in chambers].--(1) Every application and hearing under this Act shall be held in chambers and only persons whose presence the judge of the county court [or family court] permits may be present.

(2) Where the person seeking adoption is not the natural parent of the child or in any case in which a consent required under this Act has not been obtained and the application is for the adoption of a person under the age of sixteen years, the Minister may

(a) submit a written recommendation to the county court or family court regarding the adoption or to appear on the hearing of the application;

EXPLANATION

Sections 28 and 29 are based basically on the existing act except that S. 28(2) is based on draft amendment dated January 28, 1988 aimed at restricting the burden of preparing reports which seemed to have no significant content to assist the court in its deliberations. Where a consent necessary to adoption has not been obtained a court should still have the right to seek the assistance of a report from the Department which has a virtual monopoly of expertise in this area.

RECOMMENDATION 27.

That the Department of Community Services be not asked to prepare adoption reports where the adoption is a natural parent of a child unless a consent required under the Act has not been obtained.

(b) give evidence respecting the fitness and propriety of the proposed adoption having regard particularly to the welfare of the person to be adopted;

(c) assist the judge of the county court [or family court], the application of any party with the application.

(3) [Recommendation of Minister].--Where the application is for the adoption of a person under the age of sixteen years the Minister may submit a written recommendation to the county court in favour of the adoption of may appear on the hearing of the application and may give evidence respecting the fitness and propriety of the proposed adoption having regard particularly to the welfare of the person to be adopted.

(4) [Appearance by Minister].--The Minister may appear at the hearing and may assist the judge of the county court [or family court], the applicant or any party with the application.

(5) [Identification of person to be adopted].--The applicant shall, if possible, identify the person to be adopted by the birth registration number assigned by the proper authority of his place of birth and not by his name, in the title of the application and in the adoption order, and, in any such case, the applicant shall provide the judge of the county with a certificate of registration of the birth containing the fullest particulars of the birth available.

Sec. 30. [Adoption order].--(1) If the county court [or family court] is satisfied

(a) of the ages and identifies of the parties;
(b) that every person whose consent is necessary and has not been dispensed with has given his consent freely, understanding its nature and effect and, in the case of a parent, understanding that its effect is to deprive him permanently of all parental rights; and
(c) that it is proper that the adoption should take place,

the county court shall make an order granting the application to adopt.

(2) Where the Court is satisfied that an application for adoption could more appropriately be dealt with by granting an order for custody under s. 76 of this Act, whether jointly with another person or otherwise, the court may treat the adoption application as an application for custody or custody and guardianship.

EXPLANATION

Section 29(2) aims at providing an alternative to adoption for step-parents without involving the drastic guillotine of adoption which would cut off a non custodial parent after adoption from their child's life. See the English Children's Act 1976 and the Houghton "Report on Adoption" 1972 Cmnd. 5107.

RECOMMENDATION 28.

That a procedure be introduced by which a judge could treat an adoption application by a step-parent as a custody application if this would be more appropriate. If successful, the step-parent could have shared custodial rights along with the custodial parent.

(3) [Change of name].--The county court [or family court], by an order for adoption, may order such change of name of the person adopted as the applicant requests, or may order that the name of the person adopted shall not be changed by the adoption.

(4) [Surname].--Unless the county court [or family court] otherwise orders, the surname of an adopted personal shall be the surname of the person who adopts him.

(5) Where it appears to the county court [or family court] that a child is, or may be, an Indian Child within the meaning of the regulations to this Act, it shall record the fact and inform the Minister.

Sec. 31. [Status of adopted person].--(1) For all purposes, upon the adoption order being made,

(a) the person adopted becomes the child of the adopting parent and the adopting parent becomes the parent of the adopted person as if the person adopted had been born in lawful wedlock to the adopting parent; and

(b) except as provided in subsection (4) of Section __ the person adopted ceases to be the child of the person who was his parent before the adoption order was made and that person ceases to be the parent of the adopted person and any care and custody or right of custody of the adopted person shall cease.

(2) [Relationships].--The relationship to one another of all persons, whether the adopted person, the adopting parent, the kindred of the adopting parent, the parent before the making of the adoption order, the kindred of that parent or any other person, shall be determined in accordance with subsection (1).

(3) [Limitation on effect of order].--Subsections (1) and (2) do not apply for the purpose of the laws relating to incest and the prohibited degrees of kindred for marriage to remove any person from a relationship in consanguinity which, but for this Section, would have existed, nor to depriving a status Indian child to his entitlements under the Indian Act.

(4) [Meaning of "child" or "issue" in instruments].--In any enactment, conveyance, trust, settlement, devise, bequest or other instrument, the expression "child", or the expression "issue", or the equivalent of either includes an adopted child unless the contrary plainly appears by the terms of the instrument.

EXPLANATION

The provision of s. 30(5) are necessary in light of the Recommendation in relation to s. 31(3) 2nd 36(6) which aims at preserving the rights under the Indian Act of Indian children who are adopted into non-Indian homes.

RECOMMENDATION 29.

That provisions be inserted into the Act to preserve the rights of Indian children under the Indian Act who are adopted into non-Indian homes.

WARNING - TO LEGISLATIVE DRAFTSMAN

The author has tried to check the cross referencing of sections in this Act to the old Act. A further check would be desirable to ensure that s. 31 (1)(b) and similar provisions correctly cross reference to the appropriate provisions.

RECOMMENDATION 30.

That words similar to the last words of s. 31(3) be inserted to confirm the Supreme Court of Canada decision in National Parents v Supt of Child Welfare. [1976] S.C.R. 751 and reflect concerns of Mic Mac Social Services.

Sec. 32. [Subsequent adoption].--In the case of a subsequent adoption all the legal consequences of the previous order terminate, except so far as any interest in any property which has vested.

Sec. 33. [Application of sections].--Sections and shall apply to all orders for adoption made in the Province, whether before or after the coming into force of the Sections, but not so as to divest any interest in property that has vested at the coming into force of the Sections.

Sec. 34. [Appeals].--(1) A person aggrieved by an order for adoption made by a county court [or family court] or judge thereof may appeal there from to the Appeal Division of the Supreme Court in like manner as appeals may be taken from any other judgment or order of the county court.

(2) [Setting aside of order].--Any person aggrieved by an order for adoption made without notice to him hereunder may within one year after the date of the order apply to the judge of the county court who made the order, or to his successor in office, to set aside the order, and if upon such application the judge is satisfied that the written consent for the adoption was obtained by fraud, duress or oppressive or unfair means of any kind, the order may be set aside and the child restored to the person who has the legal or equitable right of his custody, or to such other person as the judge orders.

(3) [Appeal by minor].--Any person under the age of majority whose adoption is sought may appeal by his guardian ad litem but no bond shall be required or costs awarded against a person who acts as a guardian at litem.

Sec. 35. [Order final after one year].--When one year has elapsed from the date of an order for adoption the order shall not thereafter, in any direct or collateral proceeding, be subject to attack or to be set aside.

Sec. 36. [Copy of order to Registrar General].--(1) The clerk of the county court shall forward within ten days after an order for an adoption is made by the county court a copy of such order, certified to be a true copy, to the Registrar General of the Province and to the Minister and, where the original name of the person to be adopted does not appear in the adoption order, he shall attach to each copy so forwarded a copy of the birth registration certificate.

EXPLANATION : EXISTING ACT

(2) [Records to be sealed].--The order for adoption, the application, material filed and the record of the proceedings and any other written information int he possession of the county or [family court] court shall be kept in a sealed packet and shall not be open to inspection except upon leave of the county court or in the manner designated pursuant to this Act or any Regulations made thereunder.

EXPLANATION

Section 35(2) provides for a method of disclosing information similar to that in the Yukon Act ss.98(6), (7) and (8). The provisions in the Yukon Act are set out below and some of these provisions may be helpful in the drafting of regulations.

98(6) Upon the application of any adult person who has been adopted or upon the application of either of his adoptive parents, the Director shall disclosed to the applicant the particulars of adoption which shall contain at least such of the following information s is in his possession:

(a) the name after adoption of the person adopted, the date of birth and birth registration number;

(b) the names of the adoptive parents;

(c) the name of the court granting the order for adoption and the date of the order; and

(d) all information that does not tend to disclose the identity of the parents by birth or other kindred.

(7) Upon the application of any person and subject to any regulations that may be prescribed, the Director may disclose to the applicant any particulars of the adoption that he has in his possession, including identifying the parents by birth or other kindred.

(8) In respect of applications under subsections (4), (6), and (7), the regulations may be made in relation to:

(a) the procedure for making applications and the information to be supplied in support of the application,

(b) the procedure for making the disclosure,

(c) the protection of the anonymity of persons who are not the natural or adoptive parents, children, siblings, or other kindred of the applicant,

(d) the protection of the anonymity of any person who requests that his anonymity be preserved, and

(e) reasons why an application under subsection (4) or (7) may be refused.

RECOMMENDATION 31.

That provision be made for releasing information about adopted children (either a passive or active register) in accordance with regulations made under the Act.

(3) [Sealed records to be sent to Minister].--Upon the expiry of the appeal period, or at such time as an appeal is concluded, the sealed packet containing all written documentation pursuant to an adoption shall be forwarded by the clerk of the county court to the Minister by registered mail.

(4) [Certificate of adoption].--Upon the application of the person adopted or of either of his adoptive parents the Minister shall, and in any other case the Minister may issue a certificate of adoption which shall contain only the following particulars of the adoption:

(a) the name after adoption of the person adopted and, if known, his sex, date of birth and birth registration number;

(b) the names of the adoptive parents; and

(c) the name of the court granting the order for adoption and the date of the order.

(5) [Minister may examine records].--The Minister may open the sealed packet kept by him for the purpose of obtaining the information required to issue a certificate of adoption or such information respecting the person adopted as he deems necessary and, having obtained that information, shall immediately reseal the packet.

(6) In any case where it appears to the Minister that an adopted person is a status Indian he shall convey, in the manner provided in the Regulations, all relevant information about such adopted persons.

(7) [Offence].--Any agency or employee thereof who discloses any information except in the manner prescribed in subsection (4) or (5), or as permitted by the regulations, or upon an order of the county court or upon an order in writing of the Minister, is guilty of an offence and one summary conviction is liable to a fine of not more than one thousand dollars or to imprisonment for a term of not more than one year, or to both.

Sec. 37. [Adoptions outside Province].--When a person has been adopted in another province, state or country according to the law of that place, and while domiciled or resident there or having been born there, or while his adoptive parent was domiciled or resident there, he and his adoptive parent have for all purposes in the Province the same status, rights and duties as if the adoption had been in accordance with the Act.

EXPLANATION

Subsection (6) This is based on a submission of Mic Mac Family and Children's Services who stressed that though it had no desire to unnecessarily disrupt existing adoption placements. It must be stressed however that upon the breakdown of an adoption, inquiry must be made to determine whether a child is Native or Indian and, if so, appropriate notification must be given. Similarly, every child has a right to a name and identity. No Native or Indian child should lose his status and his birthright as a result of an existing adoption outside the Native Community. Justice Berger of British Columbia has recommended provisions requiring notification of those who are or may be Indian because adoption does not extinguish their Indian rights, Natural Parents v Supt of Child Welfare [1976] S.C.R. 751. The Micmac Family & Childrens' Services suggests the following:

(1) The Minister should be required to convey to the Registrar of the Department of Indian Affairs all relevant information about the adoption of status Indian children or children eligible for Band membership regardless of when such adoptions occurred;

(2) The Minister should be required to notify adopting parents of the fact that the child is or might be a Native or Indian and of the child's right to Band membership;

(3) The Minister should be required to notify the child at the age of 18 of the fact that he or she is or might be a status Indian.

(4) These recommendations should apply both to future and existing adoptions.

Items (2), (3) and (4) are more suitable for inclusion in regulations.

RECOMMENDATION 32.

That provision be made for the Minister to inform the Department of Indian and Northern Affairs of the adoption of a status Indian child so that the child's Indian rights (which are not extinguished by adoption) are maintained.

MENTALLY HANDICAPPED CHILDREN

Sec. 38. [Application for care].--(1) A parent or a guardian of a mentally retarded child or a child believed to be a mentally retarded child may apply to an agency for care of the mentally retarded child in a child caring facility.

(2) [Admission to child caring facility].--A mentally retarded child on whose behalf an application is made pursuant to subsection (1) may be admitted to a child caring facility in accordance with the regulations.

(3) [Committee to receive and review applications].--The Minister may appoint a committee to receive and review the applications and where a committee is appointed no admission to a child caring facility shall be made under this Section unless the committee approves the admission.

Sec. 39. [Discharge].--A mentally retarded child admitted to a child caring facility may be discharged from the child caring facility in accordance with the regulations.

Sec. 40. [Admission or discharge at request of parent].--At the request of a parent or guardian, any person may make representation on behalf of a mentally retarded child to an agency or any body established under the regulations for purposes of admission to or discharge from a child caring facility.

EXISTING ACT s. 29, 30, 31.

SPECIAL PROTECTION SERVICES

Sec. 41. [Duty of peace officers].--It shall be the duty of peace officers to serve any process issued out of any court and to execute any order issued by any judge of a court.

Sec. 42. [Peace officers' fees].--Where a judge certifies that a peace officer has performed services pursuant to Section 41, that peace officer shall be entitled to receive for his services fees on the scale prescribed.

EXPLANATION: EXISTING ACT

s. 32 of the old Act has been deleted as it is obsolete after the Young Offenders Act (Canada) as are the deleted words after "Judge of the court" in the present s. 41 (the former section 33).

EXPLANATION

The former section 36(1)(2)(3)(4)(5)(6) have become obsolete along with sections 39-41 save for provisions relating to places of safety and release or discharge with the consent of the Superintendent of a facility and found in the revision of the old s. 55.

REPORTING CHILD ABUSE

Sec. 43. (1) [Information re need to protect a child].--(1) Every one who has information, whether or not it is confidential or privileged, indicating that a child is abused and who fails to report that information to an agency is guilty of an offence under this Act.

(2) For purposes of s. 43(1) "abused" means acts of commission or omission by any person which results in injury to a child. This includes, but is not necessarily restricted to physical beating, parental deprivation, cutting, burning, physical assault, sexual abuse, and failure to provide reasonable protective services for the child from physical harm.

(3) [No action against person who gives information].--No action lies against a person who gives information under subsection (1) unless the giving of the information is done maliciously.

(4) [Offence].--Every one who causes or contributes to a child being or being likely to become a child in need of protection is guilty of an offence under this Act.

(5) [Limitation].--A prosecution for an offence referred to in this Section shall be commenced within one year after the day on which the offence was committed and not thereafter.

(6) Any person who in the course of their professional or official duties fails to report to an agency his reasonable grounds for suspecting that a child is in need of protective services shall be liable on conviction to a fine of not more than $2000 or to imprisonment for 6 months. (Subsections (6), (7) and (8) are based on Ontario Act s. 81).

(7) Idem: [professional or official duties, suspicion of abuse.]--Despite the provisions of any other Act, a person referred to in subsection (8) who, in the course of his or her professional or official duties, has reasonable grounds to suspect whether or not it is confidential or private that a child is or may be suffering or may have suffered abuse shall forthwith report the suspicion and the information on which it is based to a Society.

(8) Application of subs. (7).--Subsection (6) applies to every person who performs professional or official duties with respect to a child, including,

(a) a health care professional, including a physician, nurse, dentist, pharmacist and psychologist;

(b) a teacher, school principal, social worker, family counsellor, priest, rabbi, clergyman, operator or employee of a day nursery and youth and recreation worker;

EXPLANATION

Section 43 is based on the existing law (s.77) but modified in the light of a submission by which pointed out that s. 77(1) imposed a duty to report where a person had information but only gave protection to the reporter under s.77(2) if the reporting was done with reasonable and probable cause. In other words, the duty to report under s. 77(1) was under than the defence under s. 77(2) the solution was to drop the requirement of reasonable and probable cause in the defense but to retain the existing rule that malice would initiate the defence. Section 47(2) defines child abuse for the man in the street in a way more likely to be understood by him. It is adopted from the present Regulations.

RECOMMENDATION 33.

That the defence under s. 77(2) of the existing Act be as wide as the duty to report created by s. 77(1).

Section 43(6-8) reflects the Ontario view that failure by a professional to report that a child is in need of protective services is a more serious offence than when committed by the man in the street.

RECOMMENDATION 34.

That the duty of professional persons to report that a "child is in need of protective services be wider than that imposed on the general public and the penalties made more severe than those imposed on the general public.

RECOMMENDATION 35.

That the definition of what abuse that the public has to report be clarified by the use of the definition in the existing regulations to the Act.

EXPLANATION

One of the groups sought to obtain information from sources that might be reluctant to divulge it for fear of getting involved or because of some perceived confidentiality or privilege. The group's submission stated:

> "In particular, for example, it is often very difficult to obtain from hospitals or doctors information regarding the attendants of children or their parents for hospital appointments or medical treatment, notwithstanding Section 77(1).

> We believe that it would be helpful to have a form of "interrogatory" procedure whereby a Demand could be made for information from any source and the person on whom the Demand was served would be entitled to show cause to a Court why the information should not be provided. If such cause was not shown within a specific period of time when the information would have to be provided as requested.
>
> Such a provision would also require a statement to the effect that it would over ride the Access to Information Act because that presently can tend to slow down the obtaining of information, particularly if it is deposited with some government department or agency."

What seems to be suggested is a form of third party interrogatory when proceedings are not yet in progress, but in which an agency might wish to have extra information in order to determine whether a child was in need of protection. Quite apart from the question of whether this procedure should more appropriately dealt with in the Family Court Rules than this Act, it is questionable whether a 'fishing for evidence' procedure is appropriate where no proceedings are under way. It is suggested that mediation of such problems is a more appropriate way of solving the problem mentioned and one less likely to cause friction with the medical and other professionals mentioned. It is suggested that this recommendation of the Children's Aid lawyers be rejected.

RECOMMENDATION 36.

That no procedure for introducing third party interrogations be introduced prior to proceedings being introduced.

(c) a peace officer and a coroner;

(d) a solicitor; and

(e) a service provider and an employee of a service provider.

(9) Interpretation.--In clause (4)(b), "youth and recreation worker" does not include a volunteer.

Sec. 44 (1) Where an agency receives a report from a person that a child has been abused within the definition in section 43(2) or 43(7) it shall investigate the case in the manner provided in the regulations. (Partly new, partly existing s. 43(2)).

(2) Where a person has been convicted of an offence involving a child which is prescribed in the Regulations, the crown counsel concerned shall, in the manner prescribed in the Regulations inform the Supervisor of the Child Abuse Register who shall record the information in the register.

(3) In any proceedings under this Act where it is proved that the parent or guardian, of a child or any other person has been guilty of child abuse as defined in the regulations, a judge shall make a finding against such person and the agency responsible for the case shall, in the manner provided in the Regulations, report the finding to the Administrator of the Child Abuse Register who shall record the information in the Register.

(4) In any other case not covered by subsections (1) (2) or (3) in which an agency seeks to record information in the child abuse register, an agency may institute proceedings before a judge against the person alleged to have abused the child.

(5) The person alleged to have abused the child is entitled to have personal notice of such proceeding unless some other form of service is ordered by the judge.

(6) Where the person who is alleged to have abused the child is not a party to the proceedings the court may adjourn the proceedings in relation to that party.

(7) Nothing in this Act shall preclude the Supervisor of the Child Abuse Register retaining information registered pursuant to the Children's Services Act 1976.

(8) It shall be open to a person whose name appears on the Child Abuse Register to apply to a judge to have their name removed from the register where it appears that there is significant credible evidence which satisfies the judge that circumstances or behaviour which led to the registration were (i) untrue, or (ii) have changed and no longer present a significant risk to children.

(9) No proceedings to remove a name from the register pursuant to s. 44(8), shall be initiated within three years of the date of registration except with the leave of the Court.

EXPLANATION

It was suggested that the old s. 77(3) (the new s. 43(4)) "seems to be very broad but it has, on occasion, occurred to us the former Juvenile Delinquents Act contained a provision which allowed the authorities to charge a person who was "contributing 77(3) would permit agencies, in some cases, to take effective action against people who were the cause of difficulties with a child rather than take apprehension proceedings to place the child in a foster case situation. The question that also arises with this Section is the determination as to who would have the right to lay a charge.

Experience has shown that the police forces are reluctant to get involved in laying a charge with a Statute of this sort particularly when it deals with provisions that they are not familiar with on a day to day basis. We would suggest that the agents or agencies be specifically given the authority to lay the charge and the solicitors for the agencies, the authority to prosecute the charge.

RECOMMENDATION 37.

That s. be reviewed to see whether it needs strengthening in the light of the explanation above and that, in any event, agents or agencies be authorized to lay charges. If such monitoring reveals that the Act needs strengthening a new subsection be added. "Proceedings under subsection three may be instituted either by an agent or agency duly appointed or authorized under this Act."

EXPLANATION

Sec. 44 reflects "A Review of the Ontario Child Abuse Register" by N. Bala, prepared for the Department of Community Services, Ontario, and a working group of representatives of the Department of Community Services and Attorney General's Department to have the Child Abuse Register better comply with the Charter. The Nova Scotia Group recommends that cases in future only get on the register after a court hearing. Whenever possible the case should be dealt with at the same time as the proceedings in family or provincial court. In exceptional cases where this course is not possible an agency should be able to take the matter before a family court. This latter course might also cover cases where proof was possible on the balance of probabilities (bearing in mind the seriousness of the allegation) but not beyond a reasonable doubt.

RECOMMENDATION 38.

That registration on the Child Abuse Register be possible in the case of third parties who are not caregivers of a child. (1987 Task Force p. 189).

RECOMMENDATION 39.

That third parties (i.e., non-caregivers of a child) who are convicted of an offence mentioned in the schedule, shall have that conviction forwarded by Crown Counsel in a manner prescribed by regulations to the Child Abuse Register.

RECOMMENDATION 40.

That where a caregiver of a child has been found by a family court judge to have been guilty of child abuse as defined in the regulations, the judge shall make a finding against such person and the agency responsible for the case shall in the manner provided in the regulations report the finding to the Administrator of the Child Abuse Register.

RECOMMENDATION 41.

In any case not covered by the previous two recommendations in which an agency seeks to have a person's name removed from the Child Abuse Register, the agency may institute proceedings before a family court judge to have the alleged abuser's name removed.

RECOMMENDATION 42.

That the procedures relating to the removal of a name from the Child Abuse Register be tightened both as to training and the criteria for removal of a name from the register.

(10) [Confidentiality].--The child abuse register shall be treated as confidential and shall be available only upon the approval of the Minister for the purposes of

(a) research as defined by regulations; or

(b) assisting in the study of the circumstances where a child is suspected to be in need of protective services.

(11) The Minister may, upon receipt of a request in writing, advise whether

(a) a person applying to be an adoptive parent or to be a foster parent; or

(b) a person, including a volunteer, caring for or working with children,

is on the child abuse register and the person who receives the information shall treat the information as confidential.

EXPLANATION

Existing Act s. 43 and Bill 81.

Sec. 45 An agency and a parent or guardian may apply jointly in accordance with regulations made pursuant to this Act for the appointment of a mediator in an attempt to resolve differences between them concerning a child who may become a child in need of protective services if the matter is not resolved.

EXPLANATION

This is an attempt to resolve by an agreement reached with the help of a neutral mediator, disputes between an agency and the parents or guardian of a child concerning a child who may, in the future, become a child in need of protective services, if the matter is not resolved. It is an alternative to the views of the Department of Community Services mentioned below and is based on literature referred to in the Introduction.

RECOMMENDATION 43.

That legislation permit a joint application for mediation by or/an agency and parent or guardian.

Several presentors requested the inclusion of a provision enabling a court to make orders where the evidence was insufficient to hold that a child was in need of protective services but where the child might, if action was not taken soon, become a child in need of protective services because a parent failed to discharge his or her parental responsibilities. The provisions suggested by the Department are set out below:

1. (1) Where a person does not fulfil his obligations of parenthood or his obligations of guardianship in relation to a child such that the child is likely to become a child in need of protection by reason of the said failure, an agency may apply to the Court for an order requiring the parent or the guardian to appear before the Court at a date, time and place as ordered by the Court.

   (2) Obligations of parenthood and obligations of guardianship mean being a meaningful and positive influence in the life of the child by providing affection and guidance to a child and providing reasonable care to and accommodation for a child.

2. At the date, time and placed fixed by the court, the Court shall inquire into the matter, and where it appears that the person is failing to fulfil his obligations of parenthood or obligations or guardianship in relation to a child, and that the continued failure is likely to result in the child being in need of protection, the Court may make an order specifying the actions to be taken by the parent or guardian which in the opinion of the Court are required for the parent or guardian to fulfil his obligations, including an order for the psychiatric, medical or other assessment of the parent, child or guardian and an order for the parent, child or guardian to obtain treatment where an assessment indicates that treatment is appropriate.

3. Where the Court makes an order pursuant to Section 2, the Court shall advise the parent where it is appropriate to do so, that failure to comply with the order of the court may result in the child being determined, pursuant to the provisions of the Act, to be a child in need of protection.

4. Failure to obtain the assessment or treatment ordered by the Court by reason of the lack of availability of such assessment or treatment services shall not be considered as a violation of the Court order or non-compliance with the Court order, provided that the Court is satisfied that the parent made reasonable efforts to comply with the order.

Several groups, including parents and the author feel that the view advanced on page 83 will (i) bear most heavily on poor or uncooperative parents or those choosing unconventional lifestyles; (ii) involve significant additional costs since this is a service not currently undertaken and; (iii) will be difficult to frame in terms complying with the Charter because the terms used are lacking provision and (iv) is incompatible with the philosophy of the legislation as proposed by the author. The submission has, however, been brought to the Minister's attention in view of the strong, albeit minority, support for this view.

RECOMMENDATION 44.

That no lesser standard for court ordered intervention be introduced below that of a "child in need of protective services" although a mediation mechanism be instituted to try to help reach voluntary agreements and to prevent children from becoming in the future in need of protective services.

COURT PROCEDURE

Sec. 46. [Notice to parent to bring child before judge].--(1) An agent may, by notice in writing served upon the parents or guardians, require the parent or guardian to appear or bring a child named in the notice before a judge at a place named in the notice and at a time not later than 12 clear days after the date of the service of the notice to determine whether the child was or is in need of protective services and whether an order pursuant to s. 52 should be made.

(2) Where there is significant evidence that is necessary for the protection of a child, a judge may order at that hearing or at any time thereafter that temporary care and custody of a child be granted to an agency whilst the child remains in the care of its parent or guardian.

(3) In any proceeding pursuant to this Act in which there is or is likely to be an allegation by an agency that a child is a child in need of protective services the agency shall, when commencing the proceeding, deliver to the parent or guardian a full statement of the particulars of any allegation intended to be placed before the court together with a summary of applicable court procedures and an explanation of the order being initially sought and any other orders that can be granted by the court and a notice explaining the desirability of obtaining legal counsel with the address of Nova Scotia Legal Aid or similar organizations in the locality. (Bill 81)

or

(ALTERNATIVE WORDING OF S. 46(3) LINE 5 TO END).

(The parent or guardian a "statement of particulars of allegations in a form complying with the Family Court Rules" then continue line 9 "and a notice" to end of line 11.

(4) In no case shall a court lose jurisdiction or dismiss a case because of a technical failure to comply with subsection three.

(5) Where in the opinion of the Director a child is of sufficient age and understanding to comprehend the purpose of a notice and other proceedings under this section the Director shall make all reasonable efforts to inform the child and his family with whom he resides when the notice is given of the facts and the reasons for such action by the Director. (Yukon s.120)

EXPLANATION

S. 46 represents an attempt to blend the existing s. 44(1) and s. 44 C (introduced by Bill 81) to encourage bringing cases to court without apprehending children whilst giving the maximum information to the parents about the agencies concerns, the orders they are seeking and the desirability of the seeking of legal advice at the earliest possible moment.

The time limits in subsections (1) and (8) are there to ensure that parents and agencies have time to obtain assessments but not so long that agencies feel obliged to apprehend a child because the risk of leaving the child in his own home for that length of time is unacceptable.

It has been suggested that in some cases under this section it may be necessary for an agency to acquire the temporary care and custody of a child. Such an important decision, where grounds for apprehending the child are not present, should require a court order in the author's opinion.

RECOMMENDATION 45.

That an improved procedure to establish whether a child is in need of protection be created, without removing the child from its home.

RECOMMENDATION 46.

That the time for a first hearing not be reduced below 12 clear days unless additional extra judges be appointed.

RECOMMENDATION 47.

That under this procedure the parents retain parental rights unless a court on application orders that temporary care and custody be transferred to an Agency.

RECOMMENDATION 48.

That a first hearing dealing with orders for assessments and temporary care and custody be held within 12 days and the protection hearing commenced within 2 months from that date unless a judge otherwise orders and indicates in writing why this is in the best interest of a child.

(6) Where a child alleged to be in need of protective services appears to be a native Indian child, the agency when serving the notice in writing shall in the manner prescribed by regulations inform Mic Mac Family and Children's Services.

(7) [Order of judge].--A judge who conducts a hearing under this Section may make such order as he considers necessary including the referral of the child, parent or guardian for psychiatric, medical or other examination or assessment or of medical treatment of the child.

(8) Where a judge adjourns a case in order for an assessment or report to be made pursuant to subsection 7, he shall set a date within two months (or such longer, period as he may determine) of that date to determine whether the child was in need of protective Services.

(9) The court in making an order under subsection (7) may make such order as to the payment of the person conducting the psychiatric, medical or other assessment, as it deems proper.

(10) In any case in which a judge determines that no assessment is necessary or no assessment is requested by the parties, the judge shall either determine whether the child is in need of protective services or adjourn the case by agreement with the parties for a period not exceeding 30 days.

POSSIBLE ALTERNATE WORDING (ONLY IF THE SUGGESTIONS ON PAGES 76-78 ARE ACCEPTED AND AUTHOR'S RECOMMENDATION IS REJECTED)

(11) An agent may by notice in writing served on the parent, guardian to appear and to bring the child names in the home before a judge at a placed named in the notice and at a time not earlier than 4 clear days not later than 21 clear days after the date of the serve of the notice to determine whether the family is in need of guidance and whether an order under Section 59(2) or 59(c)(i) or (ii) should be made.

(12) For the purpose of S. 46(3) a family in need of guidance shall include a "child" whose parent or guardian has and wilfully or avoidably significantly impaired the child's ability to develop in an environment acceptable to local community standards.

EXPLANATION OF SUBSECTION (6)

The Child Welfare Act, 1984 of Alberta S.A. 1984 c. C. 8-1 section 73 makes specific provision for notification of the Chiefs and Councils or their designants in the event that the Director has reasonable grounds to believe that a child is Indian, a member of a Band and resident on a Reserve. The problem of the loss of cultural identify by cross-racial adoption or foster caring is a national and inter-national one. Nova Scotia in accordance with the United Nations Declaration of the rights of the child, has recognized the importance of promoting and preserving a child's cultural identify. Consequently, Nova Scotia should develop legislation to ensure that in all cases Native and Indian children receive the benefit of involvement by a Native or Indian Child Welfare Agency dedicated to the furtherance of these aims.

We propose legislation which would incorporate provisions from Alberta's and the United States Indian Child Welfare Act. the following wording is for illustration purposes only:

> "The Minister, an agent or Agency, shall make all reasonable inquiries prior to entering into any arrangement affecting the custody or placement of a child, to determine whether the child is a Native or Indian. If the Minister, agent or Agency, after having made such reasonable inquiries, has grounds to believe that a child is Native or Indian, notification shall be given as follows:
>
> (1) If there are reasonable grounds to believe that the child is a Native or Indian, a member of a Band or entitled to be a member of a Band, and resident on a Reserve, the Minister, agent or Agency shall notify the Chief and Council of the Reserve, wherever situated in Canada, the United States or Mexico or the designate of that Chief and Council.
>
> (2) If there are reasonable grounds to believe that the child is a Native or Indian but not a member of a Band or not resident on a Reserve, the Minister, agent or Agency shall notify a Native Family and Childrens' Services Agency within the province."

It is suggested that a definition of Native or Indian be included in the Act which will include all aboriginal peoples of North America and all people of Native ancestry including those normally resident in the United States and Mexico. Provision should be made for notification of the child's Tribe or Nation in the child's Tribe or Nation in the child's country or province of origin. The Micmac Family & Children's Services urges the Provincial Government to undertake negotiations with other jurisdictions in Canada to ensure that similar notification is given in all provinces and territories on a reciprocal basis.

RECOMMENDATION 49.

That a court be empowered to make orders for the payment of assessments or examinations as it deems proper.

A minor problem with this approach is that it assumes that Children's Aid Societies (other than Micmac Social Services) will know which Indian Band to contact. Although Micmac Social Services is not yet fully operational it is likely to be by soon after the date of implementation of legislation based on this report. It is recommended that the basic content of the Micmac Social Services submission be implemented by regulation.

RECOMMENDATION 50.

That legislation provide that where a child appears to be a native Indian child, an agency shall, in the manner described in regulations inform Micmac Family and Children's Services.

RECOMMENDATION 51.

That the initial hearing in a case in which a child is alleged to be in need of protective services should be held within 12 clear days of the service of the notice of hearing on the parent or guardian, and that at such initial hearing the court shall determine whether any assessments or examinations of the parent, guardian or child should be ordered or whether the child should receive medical treatment. In addition, the court should determine whether the parents retain full parental rights or merely care, in which case temporary care and custody should pass to the agency.

RECOMMENDATION 52.

That legislation prescribe that the hearing of whether a child was in need of protective services should be held within two months (or such longer period as is fixed by the judge) of the initial hearing.

Sec. 53. Where a child is found at large and appears to be a child in need of protective services, or is taken into care and custody pursuant to s.54 and it subsequently appears to an agency that a child can be returned to its parent, guardian or lawful caregiver within 24 hours without significant risk to the child's health or safety, a child may be held in a place of safety without the need to initiate proceedings under this Act.

(2) For the purpose of this section a place of safety is any accommodation in which a child can be held for a temporary period not exceeding 24 hours pending return to its parent, guardian or lawful caregiver provided this can be done without significant risk to the child's health or safety.

(3) For the avoidance of doubt lawful caregiver includes a foster parent.

RECOMMENDATION 53.

That legislation specifically refer to a place of safety in which children found "wandering" or temporarily in need of care and custody can be held pending return to their parent, guardian or other lawful caregiver provided that this can be done within 24 hours and without significant risk to the child. In such a case no proceedings need be initiated.

EXPLANATION

This practice is apparently in use in Cape Breton but without significant statutory authority. It was also supported by Micmac Social Services. The proposed procedures are not unlike s. 121(b) of the Yukon Act which states:

> 121 (1) Where the Director, an agent, or a peace officer has reasonable and probable grounds to believe and does believe that a child is in immediate danger to his life, safety or health, the Director, agent, or peace officer may, without a warrant,
>
> (a) take the child into care and begin proceedings before a judge under this Part,
>
> (b) take the child to a place of safety and then, without taking proceedings before a judge under this Part, return the child to a concerned parent, or other person entitled to the child's care and custody, upon the request of that concerned parent or other person, or
>
> (c) in the case of a child already in the care of the Director and who absconded or was being detained without lawful authority and without the Director's consent, return the child to such place as the director may designate.

Sec. 54 [No warrant required when child in danger].--(1) An agent or a peace officer may without warrant take a child into care where he has reasonable and probable grounds to believe the child is a child in need of protective services.

(2) [Child under 12 years of age committing offence].--Where a peace officer has reasonable and probable grounds to believe a child who is less than twelve years of age has committed acts which, but for the fact the child cannot be prosecuted, would constitute an offence under a federal or Provincial enactment or a municipal by-law, the peace officer may detain the child for the purpose of

(a) returning the child to his parent or guardian or lawful caregiver or

(b) determining whether there are reasonable and probable grounds to believe the child in need of protective services.

(3) Where the Minister, an agency, parent or guardian notifies the police that a child refuses to reside with the parent or guardian and is beyond the control of the parent or guardian, a peace officer may detain a child for the purpose of

(a) returning the child to the child's parent, guardian or lawful caregiver or person acting on their behalf.

(b) determining whether there are reasonable and probable grounds to believe that the child is a child in need of protective services.

[Bill 81]

(4) [Delivery of child to agent].--When a peace officer has taken a child into care under subsection (1) or (2) of this Section or Section 46, he shall forthwith deliver the child to an agent who shall receive the child.

(5) [Agency to have care and custody].--When an agent has taken a child into care or received a child pursuant to subsection (2), the agency shall have care and custody of the child until a court or judge otherwise orders.

(6) For the avoidance of doubt lawful caregiver shall include a foster parent.

EXPLANATION

Several of the Parent's Groups (and the lawyers who have represented them) expressed a desire for a system of prior approval from a judge (a warrant) before a child could be apprehended unless a child was in immediate danger. Such a procedure exists in the Yukon Children's Act S.Y.T. 1984 c. 2. s. 119 and the Alberta Child Welfare Act - S.A. 1984 c. C. 8.1. s. 17(2)-(8). If there is any suggestion that more children than necessary have been apprehended in Nova Scotia, this is likely to be due to the lack of precision of the old s. 44 and the fact that legal costs of utilizing s. 44 were not reimbursed to Private Agencies. It is hoped that the improvements to the new s. 46 will reduce recourse to s. 54 (apprehension). Certainly before introducing an expensive, complex and time consuming procedure such as the Alberta procedure, one would like to be sure that s. 46 (and the other improvements) will not produce the desired results. Nor is their any guarantee that the Alberta style warrant procedure would not become a pro forma exercise as some anecdotal evidence from Alberta suggests. Nevertheless the point is sufficiently important to warrant monitoring especially in the light of the United Kingdom Butler Sloss "Report of an Inquiry into Child Abuse in Cleveland" H.M.S.O. Cm. 413 (1988).

RECOMMENDATION 54.

That the use of s. 54 (taking into care and custody without warrant) be monitored to see whether it is being too widely used, when proceedings under s. 43 would constitute a satisfactory alternative.

EXPLANATION

Section 54(3) (existing s. 46(3) added by Bill 81) should be clarified to ensure that a peace officer may return a child to a foster parent caring for a child on behalf of an agency. It should also clarify that anybody lawfully entitled to the custody of a child (e.g., a family member with a court order for custody) should be entitled to have a child returned to them.

RECOMMENDATION 55.

That s. 54(3) be clarified by the addition of the words underlined so that a peace officer can return a child to a foster parent caring for a child on behalf of an agency or any person entitled to the custody of the child under court order.

Sec. 56. [Search warrant for child in need of protection].-(1) When a judge is satisfied upon the oath of an agent or a peace officer that there are reasonable and probable grounds for suspecting that a child is in need of protective services and is concealed in premises, he may issue a warrant authorizing any person named therein to conduct a search of the premises, using force if necessary, and where necessary to take the child into care.

(2) [Child's name not required on warrant].--It shall not be necessary in a warrant issued under this Section to describe the child by name.

(3) [Warrant waived when child in danger].--where an agent or a peace officer has reasonable and probable grounds to believe the health or welfare of a child is in immediate jeopardy, the agent or peace officer may enter without warrant into any premises for the purposes of taking the child into care.

EXPLANATION

Based on existing law, s. 46.

Several submissions suggested "that the powers of the agents to collect information might be clarified to the extent that an agent should have legal right to be in a child's home for the purposes of collecting sufficient information to determine whether the child was in need of assistance." Since the existing s. 46 covers entry onto premises pursuant to a warrant, and since no warrant is necessary under s. 45 if an agent has reasonable and probable grounds to believe that a child is in need of protection, it must be assumed that what is sought is a right of entry without warrant where no reasonable and probable grounds exist for believing that a child is in need of protection. On civil liberties and Charter grounds this suggestion should be rejected.

RECOMMENDATION 56.

That no procedure less onerous than the existing s. 54 be introduced to enable an agent to enter a child's home to gather evidence.

Sec. 56. [Notices to be given by agent when child taken into care].--(1) An agent on taking a child into care shall

(a) forthwith serve a notice of taking a child into care by personal service or substituted service on the parent or guardian of the child if known;

(b) forthwith notify a judge of the taking of the child into care;

(c) as soon as practicable give notice in writing to the parent or guardian of the child of the place and time of the hearing and setting out in the notice any allegations alleged to be placed before the court together with a summary, of applicable court procedures, an explanation of the order being sought and any other orders that can be granted by the court and advice to seek legal counsel as soon as possible together with the address of Nova Scotia Legal Aid or any similar Agency in the locality; [Bill 81] and

(d) bring the case before the judge at the place and time fixed pursuant to this Section.

(e) where it appears to an agency that the child in need of protective services is an Indian child the Agency shall, in the manner prescribed in the regulations inform Mic Mac Social Services.

(f) the parents or guardian of a child taken into care under this section shall be entitled to full disclosure of information in the hands of an Agency in accordance with the Family Court rules.

(g) Where in the opinion of the Director the child is of sufficient age and understanding to comprehend that he has been taken into care he shall be told of this fact and the reasons for the intervention by the Agency.

(2) [Notice of hearing].--Service of the notice of hearing shall be by personal service or, if the person cannot be found, by substituted service in such manner as the court orders.

(3) [Time of hearing].--For the purpose of this Section the hearing shall be at a time not earlier than four clear days and not later than 12 clear days after the date the child is taken into care.

(4) No technical irregularity in explanation of particulars or court process shall cause the court to lose jurisdiction.

Section 56(4) is added to ensure that the additional information required to be given to parents under Bill 81 will not, if technically breached, lead to the court losing jurisdiction.

RECOMMENDATION 59.

That full disclosure of allegations concerning why a child is alleged to be in need of protective services be given to the parents or guardians but that a technical failure to comply will not lead to the court losing jurisdiction.

Sec. 57. For the purpose of proceedings initiated under s. 46 or 54 a foster parent who has cared for a child for the six months prior to the proceedings, may apply to the court and if granted party status, shall thereafter be

(a) entitled to the same notices as a party

(b) to be present at the hearing or to be represented by a lawyer

(c) to make submissions to the court but shall take no further part in the proceedings without leave of the court. [Based on s. 39(3) of the Ontario Child and Family Services Act.]

EXPLANATION

The provisions are largely based on s. 47 of the existing Act and the proposed s. 49A.

RECOMMENDATION 57.

That where a child apparently in need of protective services appears to be an Indian Child the agency concerned shall inform MicMac Social Services (see also p. 84 ante).

TIMES LIMITS FOR A FIRST HEARING IN AN APPREHENSION CASE

A few submissions all wanted the initial hearing held quickly, perhaps as early as within 3 clear (ordinary working days) whilst it is true that the Nova Scotia limits are longer than most other Provinces (e.g. within 5 days in Ontario) it is also true that if a hearing is held quickly it is more to hold Agencies accountable than to protect parent's rights, since parents requiring legal aid need something like 3 weeks in which to arrange this currently in Nova Scotia.

Since s. 49A was introduced by Bill 81 it is clear that when that provision is implemented the main protection hearing must be held within 30 days unless all the parties agree. However in many cases the medical or psychological assessments may not be available for up to 3 months. It seems desirable however, to impress a sense of urgency into the system by stating that the protection hearing must be held within two months (or 30 days where there is no agreement) and must comply with the limits on orders set out in the Act.

Bringing the time limits down below 12 clear days for "apprehensions" and 12 clear days for the improved "notice to bring" procedure would require the appointment of significant numbers of additional judges (perhaps as many as 4). If significant members of parents want the protection hearing held with 30 days this too will place considerable strain on the judiciary, the legal aid system and those providing medical or psychological assessments. For the same financial outlay perhaps a reduction in social work caseloads would be a more appropriate use of scarce workers.

RECOMMENDATION 58.

That first hearings be heard within 12 clear days and this period only be reduced if extra judges are appointed.

EXPLANATION

This is an attempt to raise foster parents (should they so wish) to almost the status of parties in child protection cases and is based on s. 39(3) of the Ontario Child and Family Services Act.

RECOMMENDATION 60.

That provisions similar to s. 39(3) of the Ontario Act be implemented.

Sec. 58 (1) The hearing pursuant to section 56 shall be a time not later than 12 clear days after the child is taken into care.

(2) The judge shall hold a hearing for the purpose of,

(a) satisfying itself as to the identity of the child and his concerned parents or other persons entitled to his care and custody, and

(b) determining whether reasonable and probable grounds exists for believing the child was in need of protective services.

(c) to determine whether separate representation for this child is desirable.

(d) make an order in conformity with subsection (11).

(3) Where, at the conclusion of the hearing under subsection (1), the judge finds that reasonable and probable grounds do exist for taking the child into care, the judge shall

(a) subject to subsection (6), set a date and place for a hearing before a judge to determine, within two months (or such longer period as the judge may determine) whether the child is in need of protective services and what order ought to be made in consequence of that determination.

(b) make an order in conformity with subsection (7), (8) or (9).

(c) if a concerned parent, or other person entitled to the care and custody of the child, is not present, give direction as to the manner of service of the notice of the hearing referred to in paragraph (a) on the absent concerned parent or other person entitled to the care and custody of the child.

(4) Where, at the conclusion of the hearing under subsection (1), the judge finds that there are no reasonable and probable grounds for taking the child into care, the Agency shall return the child to the concerned parent, or other person entitled to the child's care, in whose care and custody the child was when he was taken into care.

(5) The Agency shall return the child pursuant to subsection (4) as soon as the return may reasonably be done, having regard to the best interests of the child, but the return of the child shall not be delayed more than 48 hours unless a judge authorizes a longer delay.

(6) The court under this section shall not adjourn a hearing for more than thirty days,

RECOMMENDATION 61.

That after the Dawson case, s. 58 clarify the purpose and powers of the initial hearing in an apprehension case and what are the court's powers. This is based on a combination of 123(5), (6), (7) and (8) of the Yukon Act and Bill 81, s. 49A.

RECOMMENDATION 61A.

That Agencies be not able to object to adjournments of more than 30 days since the benefit was intended to accrue to private individuals on whom unsought adjournments may most heavily impact.

(a) unless the concerned parent or guardian or the person who will be caring for the child during the adjournment consent; or

(b) if the court is aware that a party who is not present at the hearing objects to the longer adjournment;

(7) Where a hearing is adjourned, the court shall make an interim order for care and custody providing that the child,

(a) remain in or be returned to the care and custody of the person (other than a foster parent) who had charge of the child immediately before intervention under this Act;

(b) remain in or be returned to the care and custody of the person referred to in clause (a), subject to the friendly supervision of the agency and on such reasonable terms and conditions relating to the child's supervision as the court considers appropriate;

(c) be placed in the temporary care and custody of a person other than the person referred to in clause (a) with the consent of that other person, subject to the friendly supervision of the agency and on such reasonable terms and conditions relating to the child's supervision as the court considers appropriate; or

(d) remain in or be placed in the temporary care and custody of the agency, but not be placed in,

(i) a place of secure custody as defined in the Young Offenders Act, or

(ii) a place of open temporary detention as defined in that Act that has not been designated as a place of safety.

(8) The court shall not make an order under clause (c) or (d) of subsection (7) unless the court is satisfied that there are reasonable and probable grounds to believe that there is a risk to the child's health or safety which is unacceptable in the circumstances and that the child cannot be protected adequately by an order under clauses (a) or (b) of subsection (7).

(9) Where an Agency and the parent or guardian of a child are in agreement with respect to care or care and custody of a child, the judge need not enquire into the matter of care or custody as described in subsections 7 and 8.

(10) For the purpose of this Section, the court may admit and act on evidence that the court considers credible and trustworthy in the circumstances.

(11) When making an order under subsection 2(d), a judge may order the parent, guardian or child for psychiatric or medical or other examination or assessment or for treatment of the child.

EXPLANATION

The word substantial risk in Ontario Act has proved to be difficult to interpret. In the unreported case of In the Matter of Rosal decision of Judge Felstiner dated April 16th, 1986. The judge described the Ontario equivalent provision as having significantly lowered the standard of protection of children. Some Nova Scotia Family Court Judges feel it is incompatible with s. 76 of the existing Act. It is recommended that some other word be found to concentrate the issue on the risk to the child's health and safety.

RECOMMENDATION 62.

That the word substantial risk in s. 49A(3) of the existing Act be replaced in subsection 9 with either "significant risk" or "a risk unacceptable in the circumstances."

EXPLANATION

See preceding page.

Some submissions wanted to order that treatment could be ordered on the parents or guardians of a child after the initial hearing in an apprehension case. Since this hearing is likely to be short and no finding will have yet been made that the child is in need of protective services it seems a breach of civil liberties to impose such treatment on the parents or guardian. There may, however, be a case for ordering treatment of the child.

RECOMMENDATION 63.

That no power to order treatment of a parent or guardian be given to the court in the initial hearing of an apprehension matter.

(12) There shall be a rebuttable presumption that failure to comply with the time limits specified in this section is prejudicial to the interests of the child and it is therefore the duty of the Director, the concerned parents, and the judge to comply with those time limits.

EXPLANATION

Based on S. 123 (8) and (9) of the Yukon Act, strengthened so that the exception created to the rule requiring a hearing being held with two months remains an exceptional recourse. Drafting techniques used to ensure that the exception remains an exception could require (i) a presumption that extension are contrary to the child's best interests (ii) a requirement that the extension could only be used where there was "clear and convincing evidence" that it was in the child's best interest" and/or (iii) requiring a judge to give written reasons for granting the extension.

RECOMMENDATION 64.

That legislation require that the main "protection hearing" be held within two months with a limited exception allowing for an extension in the best interests of the child based on s. 123(8) and (9) of the Yukon Act.

Sec. 59 (1) Where the Agency or an agent makes an application to a judge under this Part, the Agency has exclusive conduct of the application and may, in their discretion, continue it or discontinue it.

Sec. 60 (1) In proceedings under this Part,

(a) In the absence of the appointment of a separate representative for the child under section the Agency is a representative of the child and the interest of the Agency is to seek the best interest of the child; and

(b) the judge has jurisdiction to hear and determine and shall, in accordance with this Act, hear and determine on its merits any application made by the Agency, regardless of whether some person who has a right to be present is present and regardless of whether a person who is, under this Part, entitled to be served has been served with notice of the hearing or application.

(2) Where a person who is, under this Part, entitled to be served with notice of a hearing or an application is not served with the notice and is not present at the hearing and the judge makes an order in that hearing or in respect of the application, that person may apply to a judge under the subject to subsection for an order to set aside in relation to him the order so made.

(3) Where an order is set aside in relation to a person who applied under subsection (2), the order continues to have the same effect in relation to all other persons as if no order had been made in relation to the person who applied under subsection (2).

Sec. 61 (1) The purpose of the hearing set under section 46 or 58(2) is for the judge to determine whether the child is in need of protective services

(i) at the time of the notice to bring or

(ii) immediately on the child's being taken into the care and custody of the Agency or

(iii) at the time of the hearing.

If such a finding is made such finding shall be recorded and the court shall then determine what order ought to be made in consequence of that finding, and pending the conclusion of the hearing the judge may:

(a) further adjourn the hearing from time to time for a period up to but not exceeding the time limits set out in s. 62 and make an order:

EXPLANATION

Section 59-61 Based on S. 125 and 126 of the Yukon Act and intended to clarify the law.

EXPLANATION

On the time at which the finding that a child is in need of protective services should be made. During some of the discussions the point was made that the presumption of sending the child home after the initial hearing is likely to lead to some increase in the number of breakdowns in such cases and their return to court. The court at such subsequent hearings should have the benefit of the transcript of the earlier hearing especially in the case where the child was in need of protective services when the agency intervened but where there had been some improvement by the protection hearing and the judge felt that the parents deserved a chance to care for the child again.

RECOMMENDATION 65.

That the time at which a finding that a child is in need of protective services is relevant be clarified.

EXPLANATION

Subsection 1(a) is intended to cover cases where, as several correspondents requested, the adjudicative part (is the child in need of protective services) and the disposition are separate or where there is no sufficient evidence to proceed to the adjudicative stage.

(i) for the temporary care or care and custody of the child as he deems proper, or

(ii) for the referral of the child, or the parent or guardian, for psychiatric or medical or other examinations or the child for medical treatment;

(b) dismiss the case where he finds the child is not a child in need of protective services, and at the request of either parent or guardian and after considering the wishes of the child twelve years of age or older and of sound mind, grant an order for custody of the child as between the parents, guardian or other persons upon such conditions as he deems proper and allowing a period of up to 48 hours (or such longer period as is specified by the judge) for such transfer of care and or custody of the child; or

(c) find that a child is a child, in need of protective services and then the judge shall

(i) adjourn the disposition of the case from time to time for a total period not exceeding the time limits set out in s. 62 and make such order for supervision of the child in the care and custody of his parent or guardian by an agency as is the best interests of the child upon such reasonable terms and conditions relating to the child's supervision as the court considers appropriate; or

(ii) adjourn the disposition of the case from time to time for a total period not exceeding the time limits set out in S. 62 and make such order for the supervision of the child in the care of a person mentioned in paragraph (i) subject to the temporary care and custody of an agency or

(iii) adjourn the disposition of the case from time to time for a total period not exceeding the time limits in s. 62 and make such order for supervision of the child in the care and custody of a person other than the parent or guardian subject to the friendly supervision of the agency and such reasonable terms and conditions relating to the child's supervision as the court considers appropriate; or

EXPLANATION

Based on existing S. 49 but with an expanded range of options - see page 34 and follow up of the Introduction.

RECOMMENDATION 66.

That an expanded range of options including a limited form of temporary care and custody be introduced and made available to the court.

The practice of courts indirectly creating a form of temporary care and custody by means of judicial innovation (see J.L. & R.L v C.A.S. of Halifax (1985) 44. R.F.L. (2d) 437 (N.S.C.A.) even though it is not mentioned in the Act is given recognition. It is only recognized however, in those cases where a parent or caregiver needs time to give effect to a credible plan placed before the court in order to secure the return of the child, e.g. to undergo parent effectiveness training. The time limits on the Act will still apply.

At the suggestion of lawyers acting for Children's Aid Societies an attempt has been made to specify supervision. The word friendly in relation to supervision attracted criticism and has been dropped.

RECOMMENDATION 67.

That included in the expanded range of orders be a limited form of temporary care and custody.

(iv) make an order for temporary care and custody in favour of an agency for a period not exceeding the time limits set out in s. 62 to give a parent or guardian time to implement a credible plan, which, if successful, will lead to the return of the child; or

(v) in any case coming within paragraph (iv), immediately before the expiry of such period, the judge shall determine whether to return the child to its parent or guardian or child giver or to make and order under paragraph (vi) or (vii); or

(vi) commit the child to the care and custody of a person pursuant to the custody provisions of this Act or;

(vii) commit the child to the care and custody of an agency;

(viii) in any case under paragraph (vii) the court may on the submission of the child's guardian ad litem, a foster parent having standing under s. 57, or any person, make a recommendation as to the placement of the child.

(2) In the event of a judge making an order under s. 61(1)(c)(iv), (v), (vi) or (vii), and when requested by a party he shall give written reasons for the decision.

(3) A court shall not make an order under s. 61 (1)(c)(vii) if a less intrusive order pursuant to s. 61(1)(c) (i)-(v) inclusive could be made without exposing the child to unacceptable risks to the child's long term health, (including mental health) safety or emotional development.

(4) For the purpose of this section reasonable supervision means the right of an agency to have unimpeded access to a child in the care or custody of his parent or guardian at such times as are agreed between such persons and the agency or have been specified by the court and in the event of a refusal of access or failure to abide by the reasonable terms and conditions imposed by the court, to take the matter back to court or to use its powers in relation to a child in need of protective services.

(5) Where a parent or guardian fails to comply with any reasonable term or condition or any order for treatment, assessment or examination under section 46(7) or 58(11) or 61(1), the court may draw such adverse inference from the failure to comply with the said order, term or condition as is appropriate.

EXPLANATION

The practice referred to in subsection (1)(viii) has unofficially occurred in some cases, e.g., see Richardson v. Richardson. CSA 85/26 judgement of Judge Niedermayor 25 July 1986. It is also a necessary interim transitional measure to protect native or black children who have bonded to white foster parents who wish to adopt but while there is a general principle of placing them in their own community the problem of patriating Native children in Alberta or Manitoba should not repealed here.

An attempt has been made to define temporary care and custody. Parents groups have commented on children in care being subjected to ear piercing and other matters affecting their appearance whilst in care. This matter may need attention when policy manuals are being drafted.

Whilst it is impossible to specify all the reasonable terms and conditions that might be appropriate to particular facts and included in a court order, one term has been added to cover the problem of mothers who cannot get their children back until they get suitable housing and yet they cannot afford suitable housing until they obtain a shelter allowance from Municipal or Provincial Social Assistance for themselves and their children.

It is not anticipated that terminations of benefits be dealt with by the court rather that such benefit will be incorporated into the or usual social assistance or family benefits system after the making of the court order.

RECOMMENDATION 68.

That a court be granted power to order a temporary payment of social assistance at the usual rate in order to secure custody of his or her child where the shelter allowance is essential to secure the housing necessary for a parent or guardian who is otherwise fit to have custody.

RECOMMENDATION 69.

That termination of parental rights by making an order for child custody of an agency be seen as a last resort only to be made where other alternatives would expose the child to unacceptable risks to his or her health (including mental health) safety or emotional development. It is not intended that no order can be made until a less intrusive order has been first tried.

(6) Without prejudice to, and without limiting the power of a judge to impose reasonable terms and conditions appropriate to the individual facts of a case, a judge may order that Municipal Social Assistance should be paid, for a period not exceeding three months, at the approved rate set by statute or regulation in order to enable a parent or guardian to secure suitable housing and to direct that so soon as such housing has been obtained that the child be returned to such parent or guardian.

(7) During the time the child is in the temporary care or care and custody of an agency the agency shall have the following powers:

(a) subject to subsection (8), power to determine who can have access to the child and upon what conditions, but the parent or other person who, but for the proceedings under this Part, would be entitled to access to the child, or to custody, or to care and custody of the child shall have reasonable access to the child with the consent of the Director, such consent not to be unreasonably withheld having regard to:

(i) the age of the child and the frequency of visits necessary to maintain bonding between the parent, guardian or lawful caregiver and the child

(ii) any risks to the child in allowing such access

(iii) all credible plans to facilitate access by means or using suitable third parties to assist with transportation of the child, supervising access or any other matter.

(b) power to give consent to any necessary medical care or attention for the child, unless a parent, or other person entitled to the prior care and custody of the child, has notified the Agency that he objects to the Director giving the consent.

(c) the duty to provide for the child's physical and emotional needs, and

(d) notwithstanding paragraph (b), power to arrange and give consent to any medical or psychiatric examination or assessment for the purpose of ascertaining the physical or mental condition of the child.

EXPLANATION

Based on Yukon Act Part 4, Division 5

(8) (a) A person who, is entitled to have reasonable access to the child and who alleges that the Director has unreasonably withheld his consent to access may apply to the judge for an order and the judge may make an order settling the terms and conditions of reasonable access by that person to the child.

(b) In determining whether the agency has unreasonably withheld access the court may consider all matters including (a) the age of the child and (b) any reasonable and trustworthy offer to facilitate transportation access or supervision from reliable volunteers or other person.

[Based on s. 138 (Yukon Act)]

[Rights of parent whilst a child is in temporary care and custody or an agency]

(9) For the avoidance of doubt a concerned parent or guardian of a child in the temporary care and custody of an agency retains the right to:

(a) the consent of the concerned parent shall be required in any application for adoption or marriage of the child; and

(b) a parent or other person who but for the proceedings under this Part would be entitled to access to the child or, to custody, or to care and custody of the child shall have reasonable access to the child with the consent of the Agency such consent not to be unreasonably withheld.

(10) An order for temporary care and custody ceases on the happening of the first of the following events

(a) the expiry of the order for temporary care and custody

(b) the child ceasing to be a child within the meaning of this Act unless proceedings plan initiated and not complete under this Act

(c) the child is adopted with the permission of the parent or guardian in accordance with this Act,

(d) the child marries.

EXPLANATION

See pages 112.

(11) An Agency shall take all reasonable steps to keep a parent or guardian informed of the health and progress or any significant development of change in circumstances of a child in the temporary care and custody of an agency.

(12) [Child becoming 16 before final order].--Notwithstanding that a child who is before the court becomes sixteen years of age before a final order is made pursuant to subsection (1), the provisions of this Act shall apply.

(13) For the avoidance of doubt a court may make an order for the temporary care and custody of a child even though the child is not present before the court and even though the child's whereabouts are unknown.

Sec. 62 [Time limits].--(1) No order for temporary care, or care and custody of a child pursuant to sections 46, 58 or 61 shall be, whether in consequence of adjournment, or of an initial order or any extension of an initial order, for a time exceeding.

(a) a period of 6 months, for a child under three years of age at the date of taking into care or issuance of the notice to bring before a judge; or

(b) a period of 9 months, for a child under six years of age at the date of taking into care or issuance of notice to bring before a judge; or

(c) 18 months in any other case.

(2) In calculating the continuity of periods referred to in paragraphs (a), (b) or (c) of subsection (1), the judge shall disregard any period or periods the aggregate of which does not exceed six weeks in which the child was temporarily returned to the care of his parents or other person entitled to his care and custody.

(3) Notwithstanding the provisions of this section a judge may on the application of a child who has attained the age of 12 years and with the written consent of the Minister, extend a period of temporary care and custody to the Minister beyond two years for further periods each one exceeding two years.

(4) [Extension of time limits in exceptional cases].--Where the parents or guardian of a child or any other person entitled to its lawful care or custody agree with an agency to extend the periods referred to in the preceding subsections, and it is in the best interest of the child, or in any other case where a judge finds an extension of the time limits referred to in the preceding subsections is in the best interests of the child, the judge may extend such limits.

EXPLANATION

Subsection 12 is based on s. 49(2) of the existing Act.

Subsection 13 clarifies the law where the child is not before the court or his or her presence is unknown. It is based on a Department of Community Services recommendation.

RECOMMENDATION 70.

That out of an abundance of caution it should be made clear that court has power to deal with a case even where a child is not before the court or his or her presence is unknown.

EXPLANATION

In order to address the child's sense of time referred to in the introduction to this report and the literature on this topic, a system of graded length of orders is introduced related to the child's age. Some flexibility is introduced by subsections four and five but it is not intended that the exception should become the rule.

RECOMMENDATION 71.

That legislation introduce a graded system of lengths of period in which a child can be in care under a court order related to the age of the child. An exception should provide for extensions in exceptional cases.

(5) There shall be a rebuttable presumption, rebuttable only by clear and convincing evidence, that failure to comply with the time limits specified in subsection one is prejudicial to the best interests of the child and it is therefore the duty of Agencies, the parents, guardian or lawful caregivers of the child and the judge to comply with those time limits. [based on Yukon Acts.123(10)]

(6) In extending the time limits under this section the judge shall give written evidence of why the extension is in the best interest of the child.

(7) An appeal at the suit of any person or agency aggrieved shall be against any extension granted by a judge.

NOTE TO THE LEGISLATIVE DRAFTSMAN

The exceptional use of the 'extension' power in subsection (6) can be maintained by (i) requiring that there be clear and convincing evidence of why the extension of the time limit is in the child's best interest, (ii) having a reputable presumption that the extension of the time limits is presumed to be against the child's best interest and for (iii) requiring the judge to give written reasons why the extension is in the best interests of the child.

Sec. 63 (1) In deciding whether to make an order for care, temporary or permanent care and custody the judge shall make an order most appropriate to alleviate the circumstances resulting in a child coming into or remaining in care and shall have regard to the following considerations relating to the best interests of the child:

(a) the bonding existing between the child, and its concerned parent or guardian, but not necessarily the bonding existing between the concerned parent or other care-giver and the child;

(b) evidence about who the child identifies and relates to as his parent or guardian;

(c) the length of time, according to the child send of time, that a child of any delay in the final disposition in the proceedings;

(d) the effect upon the child of an disruption of the child's sense of continuity;

(e) the child's right to be a wanted and needed member within a stable and secure family structure;

(f) the child's mental, emotional and physical stages of development;

(g) the risks and merits of the child returning to or remaining in the care of his concerned parent or guardian;

(h) the views and preferences of the child, where such views and preferences can reasonably be ascertained;

(i) any physical or psychological risk to the child of returning the child to, or allowing the child to remain in, the care of his or her parents;

(j) the mental, emotional and physical needs of the child and the appropriate care or treatment to meet those needs; and

(k) the cultural heritage of the child.

RECOMMENDATION 72.

That the criteria relevant to the best interests of the child be spelled out in legislation in a form similar to s. 132 of the Yukon Act. The best interest of the child was regarded as relevant in Child Protection proceedings in Minister of Health and Social Services (New Brunswick) Church (1988) 14 R.F.L. (3d). 1.S.C.R.

MEDICAL CONSENTS

Sec. 64 (1) Where an Agency receives advice from two qualified physicians that the parents, guardians or other lawful caretakers of a child are refusing to permit a non-experimental medical treatment or procedure on a child which refusal constitutes a threat to the health or safety of a child or causing the child unnecessary suffering, the Agency shall investigate the matter forthwith and in no case later than 24 hours and, if the facts are confirmed, shall place the matter before a judge without delay at an emergency court hearing held in accordance with regulations made under this Act.

(2) The Agency shall report its own decision to the physicians immediately the decision has been made, and, in the event of an agency deciding not to bring the matter before the court, the Isaak Walton Killam Hospital or any hospital designated by regulations made under this Act, shall have standing to place the matter before the court in accordance with the procedure established by subsection one and the regulations made thereunder.

(3) Where in a hearing held under this section it appears to a judge that a child is in need of protective services, a judge may order

(i) that the medical treatment or procedure be carried out on the child and that the parents not interfere with such treatment; or

(ii) commit the child to the care and custody of an agency who are authorized to consent to all necessary medical treatment on the child and

(iii) made such other order as are necessary to implement the judge's decision under (i) or (ii).

(4) For the avoidance of doubt, where the time available to utilize the Procedure in subsections one to three inclusive is inadequate, a duly licensed physician may, where a parent, guardian or lawful caregiver of a child refuses to consent to a non-experimental treatment on a child which is an immediate threat to the child's health or safety, or will cause the child unnecessary suffering, perform such treatment or procedure without the consent of the parent, guardian or lawful caregiver.

(5) A physician who performs a treatment or procedure pursuant to subsection four, shall if he performs it in a non-negligent manner enjoy a complete defence to any action undertaken against him based on his actions.

EXPLANATION

Section 64 implements the material on medical consents in the introduction to this Report.

RECOMMENDATION 73.

Since cases involving refusal of parental consent to medical treatment do not necessarily involved cases in which parental fitness are an issue except to the limited extent of consent to medical treatment, the provision should be in a separate section of the Act from cases involved other allegation of need for child protection proceedings. (2) An Order, if granted, would only deprive parents of such parental rights as would be necessary to ensure proper treatment of the child. (3) It may, however, be necessary to retain a "child in need of protective services" provision where parental consent is withheld for reasons unconnected with conscience.

In view of the Little decision, the provision should be modeled closely on the (Yukon or Alberta) Acts and provide, where possible for the (4) authorization for medical treatment to come from a Judge rather than the Director of a Children's Aid Society or similar functionary. Teleconferencing provisions should be provided in the Statute to facilitate an early hearing.

RECOMMENDATION 74.

That in any case in which a child is in need of urgently needed treatment which is (i) essential to the child's life or health; (ii) in which the parents refuse to consent to; and (iii) in a case in which the Children's Aid Society or similar society refuses to take the matter before a Family Court Judge as soon as practicable (or in any case within twenty-four hours) after receiving notice (whether orally or in writing to this effect) from the child's doctor, that a hospital designated by Order in Council be granted standing to immediately take the matter before a Family Court Judge to get an Order authorizing the treatment of the child and restricting the parents' right to interfere with such treatment.

RECOMMENDATION 75.

That for the avoidance of doubt, a residual subsection in the provisions relating to medical consents involving children whose parents withhold consent to treatment be included, stating that in any case in which recourse to the provisions for obtaining Judicial authorization to treatment are impractical, having regard to the urgency of the occasion, that a doctor who performs non-negligent treatment in accordance with normal and acceptable medical practice shall be free from any liability for such treatment.

Sec. 65 [Agent's consent to committal].--(1) Subject to subsection (2), where an agency brings a child before a judge as a child in need of protective services he shall be deemed to consent to a committal of the child to the care and custody of the agency.

(2) [Written consent of agent].--A judge shall not commit a child to the care and custody of an agency without the written consent of an agent of that agency where the child is

(a) taken into care by the agent with no prior knowledge of the child and his circumstances; or

(b) where the child has been taken into care by a peace officer.

Sec. 67 [Agency becomes legal guardian].--(1) An agency to which the care and custody is committed or transferred under this Act shall be the legal guardian of the child and as such shall have all the rights and powers and powers of a parent and those that might be conferred upon a guardian under any Act and the parents shall not have any parental rights, powers or responsibilities except those contained in this Act until

(a) the child reaches twenty-one years of age where the child is dependent because he is pursuing an education program or because of mental or physical incapacity and a judge has ordered his care and custody until twenty-one years of age;

(b) the child reaches the age of majority;

(c) the child is adopted pursuant to this Act;

(d) the child marries; or

(e) a judge orders that the care and custody be terminated.

(2) [Where custody transferred from one to another agency].- Where the care and custody of a child is transferred from one agency under this Act to another agency, the agency under this Act to another agency, the agency to which the care and custody is transferred shall be the legal guardian of the child and as such shall have all the rights and powers of a parent and those that might be conferred upon a guardian under any Act and the agency making the transfer shall cease to have those rights and powers in relation to the child.

EXPLANATION

Proposed s. 65 is existing s. 50

Proposed s. 66 is existing s. 51

(3) Where a child is in the care of an agency the agency shall take all reasonable steps to keep a parent or guardian informed of the health and progress or any significant change in circumstances to a child in the care and custody of an agency provided that in case shall the names of potential adopters be revealed to such persons.

(4) For the avoidance of doubt it shall be possible for an agency to transfer care or temporary care and custody to another agency prior to the making of a court order.

(5) Where an agency and the parent or guardian of a child agree that a child shall not be placed for adoption after the making of an order for care and custody in favour of an agency, either party to such agreement may make application to the court to have the agreement to be held to be legally binding.

EXPLANATION

S. 67(4) is added out of an abundance of caution since the existing s. 51(2) seems only to apply after the making of a court order.

RECOMMENDATION 76.

That transfers of care and temporary care and custody between agencies should be possible before any court order is made.

EXPLANATION

Subsection (5) was recommended as an enabling section to officially sanction an existing practice.

RECOMMENDATION 77.

That agencies and parents or guardians may agree in a legally binding agreement that a child shall not be placed for adoption after the making of an order for care and custody in favour of an agency, either party to such agreement may make application to the court to have the agreement to be held to be legally binding.

Sec. 68. [Restrictions on application for order to terminate care and custody].--(1) Subject to subsections (2) and (3), where a child is in the care and custody of an agency by virtue of an order granted pursuant to the provisions of subclause (vii) of clause (c) of subsection (1) of Section 61 or an order granted pursuant to the regulation transferring care and custody, a parent of the child, a person who received or was entitled to have received notice of taking the child into care, or, the agency to which the care and custody of the child was committed, and no other person except as provided by subsection (2), may apply to a judge for an order terminating the committal of the care and custody of the child to the agency.

(2) A member of the child's extended family or a child over the age of 14 years with the permission of an agency may apply to a judge for an order terminating the committal of the child to the care and custody of an agency.

(3) [When application may be made].--No application for an order terminating the committal of the care and custody of the child to an agency shall be initiated or made by any person described in subsection (1)

(a) within thirty days of the date of the order committing the child to the care and custody of an agency;

(b) while a decision respecting the child's care and custody is under appeal pursuant to Section 100 and 101;

(c) except with the consent of the Minister, (which consent shall not be unreasonably withheld)

(i) within five months after the expiry of the time referred to in clause (a),

(ii) within six months after the date of a decision dismissing a previous application to terminate care and custody, or

(iii) within six months after the date of the final disposition of an appeal pursuant to Section 100 or 101, whichever is later.

(d) except with the leave of the court, after two years from

(i) the expiration of the time for appeal from an order for care and custody, or

(ii) the final disposition of an appeal of an order for care and custody. [Bill 81]

EXPLANATION

Existing S. 52.

EXPLANATION

This Recommendation covers the case where a member of a child's extended family comes on the scene for the first time after the child has come into care and custody. At present such persons are outside the wording of the existing s.52(1). The second recommendation also recognizes the autonomy of the older child where the Agency consents to the application. (See Yukon Act s. 145.) Even if the child could not go back to this parent or guardian be might line in the care and custody of another person or enter into a s. 14 agreement.

RECOMMENDATION 78.

That where a member of a child's extended family wishes to seek care and custody of a child already in the care and custody of an agency he or she should be able to seek termination of the order for care and custody in favour of the agency.

RECOMMENDATION 79.

That an older child (over 14) with the permission of the Agency having care and custody of him or her should be able to seek termination of the Agency's order.

(3) In any case in which it is alleged that there has been an unreasonable withholding of consent by the agency under Subsection 2 a person aggrieved may appeal the matter to a judge and seek an order abridging the usual time limits prescribed by the subsection.

(4) [Agency of hearing of application for termination of custody].--A notice of hearing of an application for termination of the care and custody of an agency shall be served on the agency and the Minister in the manner prescribed by the court or the rules of court, and by personal service on any other parent or guardian at least four clear days prior to the date of hearing.

(5) [Adjournment of dismissal of application].--At any hearing under this Section, the judge may

(a) adjourn the hearing for a period not to exceed six months and order such psychiatric, medical or other examinations of the child's parent or guardian as he deems necessary;

(b) adjourn the hearing for a period not to exceed six months from the date of the application for a trial placement with the applicant;

(c) terminate the care and custody and order the return of the child to the parent or guardian under such conditions as he deems proper;

(d) terminate the care and custody and order that custody of the child be awarded to a member of the child's extended family or other suitable person on such conditions as the judge deems proper;

(d) dismiss the application.

Sec. 69 (1) In any case in which siblings are in the care, temporary care and custody or care and custody of an agency or agencies, and have been placed with different families or placements, it shall be open to the lawful custodian of such sibling, or the sibling himself if over the age of 12 and with the consent of the agency in whose care or care and custody he is to seek and a court to make, an order for access to his or her brother or sister as the case may be, provided that in no case can an order be made where either sibling has been adopted or placed in the home of persons who have given notice of their intention to adopt him.

EXPLANATION

This Recommendation aims at maintaining contact between siblings who may have had to be split for placement purposes but where neither have been adopted nor is adoption contemplated.

RECOMMENDATION 80.

That provisions be made for maintaining contact between siblings who are in separate placements but only where no adoption has occurred or seems like to occur.

Sec. 81. [Guardianship of agency until adoption order made].--(1) Where a child has been committed to the care and custody of an agency, such guardianship shall not be terminated where the child has been placed and is residing in the home of a person who has given notice of the proposed adoption of the child under this Act until an adoption order is made under this Act or until the application for adoption is dismissed, discontinued or unduly delayed.

(2) [Date of notice of proposed adoption].--For the purposes of this Section, notice of proposed adoption shall be deemed to be given on the date on which the notice of proposed adoption was filed with the Minister by or on behalf of the adopting parents.

Sec. 82. [Religion of child].--(1) A judge who commits a child to the care and custody of an agency shall inquire into and endeavour to determine the religious denomination, if any, of the child and shall include in an order respecting the child his findings respecting the religious denomination of the child.

(2) A child shall be deemed to have the same religion as its parents;

In the event of the parents being separate and apart the child is deemed

(a) to have the religion pursuant to any agreement between the parents or

(b) to have the religion of the parent have care and custody the child resident.

(2) [When judge to determine religion of child].--Where a child is being raised in a religious denomination other than his religious denomination as provided by subsection (2) or where his religious denomination cannot be readily determined under subsection (2), the judge shall determine the religious denomination of the child for the purposes of this Section to be the religious denomination he deems proper in the circumstances.

(3) [Child 12 years or older].--Notwithstanding anything in this Section, the judge shall have regard to the wishes of a child of twelve years of age or older and the father and the mother in determining what findings ought to be made respecting the child's religious denomination.

(4) [Religious basis for placement].--Where practicable a child shall be placed with a family of his own religious denomination and if such placement is not possible within a reasonable time, the child may be placed in the most suitable home available with the approval of the Minister.

EXPLANATION

Existing ss. 53 and 54.

(5) [Placement with family of mixed faith].--A child may be placed with a family where the husband and wife are of different religious denominations.

Sec. 83. [Race of Child]. For the better administration of this Act a judge who commits a child to the care and custody of an agency shall inquire into the race, whether Native Indian, Black, mixed race, white or other of a child.

Sec. 84. [Commitment of unmanageable child to training school].--(1) If in proceedings, instituted with the written consent of the Minister, which consent shall not be unreasonably withheld, it is made to appear to the satisfaction of a judge that a child in care is unmanageable and the child is living in circumstances which creates a substantial risk to the child's health or safety or the child's committal is necessary for his own protection or the protection of others or their property the judge may commit the child to a place of safety designated for the purpose by the Minister.

(2) Notwithstanding subsection (1), where a child is in care pursuant to Section 13, proceedings may be instituted only with the written consent of the parents and the Minister, which consent shall not be unreasonably withheld.

(3) A committal made pursuant to subsection (1) is not rendered invalid where the term of an agreement made pursuant to Section 8 has expired or has been terminated.

(4) Where a child is committed to a place of safety, the superintendent of the facility may release or discharge the child or may authorize the temporary absence of the child.

(5) Where a child is committed to a place of safety and the child leaves the place of safety without the approval of the superintendent or fails to return to the place of safety, a peace officer may return the child to the place of safety.

(6) A person aggrieved who alleges that the consent of the Minister pursuant to subsection one has been unreasonably withheld may apply to the court for an order requiring the Minister to give his consent.

(7) [Annual review by court].--Where a judge has committed a child pursuant to subsection (1), the Minister, if the child is still committed, shall cause the child to be brought before the court forthwith at the end of one year from the date of the committal or the last review of the committal pursuant to this subsection, and at any other time the Minister may, on his own initiative, determine, and the court shall review the circumstances

EXPLANATION

Existing S. 55.

RECOMMENDATION 81.

In order to discharge the placement policies and release of information provisions of the Act legislation should require a judge to inquire into the race of any child committed to the care and custody of an agency.

EXPLANATION

S. 84 is existing s. 55 as amended by Bill 81 except that peace officer is substituted for police officer.

There has been widespread support from groups that the lack of any right of challenge to the Ministerial consent required under the existing ss 52 and 55 requires addressing. The Minister is in a difficult position under the Act in that

(i) he has responsibility for Family Court;

(ii) is the applicant in some cases where there is no local Children's Aid and

(iii) has the power to grant standing under the exiting sections 52, 55 and 67. Since sections 52 and 55 have resource implications it is recommended that a limited challenge be permitted where the minister's consent has been unreasonably withheld. This would still allow argument about the suitability of existing services for the child concerned.

RECOMMENDATION 82.

That the existing s. 55 be amended to allow a challenge where it is alleged that the Minister's Consent is being unreasonably withheld.

RECOMMENDATION 83.

That the wording of the existing s. 55 be amended to delete the word repeatedly before unmanageable) and that the test for making an order be rephrased to concentrate on the risk to the child or others of the circumstances leading to the alleged need for the order. [Recommendation based on suggestions of Department of Community Services and several Agencies].

of the child and, having regard to the needs of the child and the interests of society,

(a) confirm the committal; or

(b) order the release of the child.

Sec. 85. [Separate Representation].--(1) where it appears to a judge that separate representation is required for a person under a disability, the judge may appoint either a lawyer or social worker, as the facts require, to be a guardian ad litem to better protect the best interests of the child pursuant to this Act.

(2) The following may have a guardian ad litem appointed for them

(a) a parent or guardian who is under the age of majority;

(b) a child with no guardian;

(c) a mentally incompetent person who is less than twenty-one years of age;

(d) a person who is less than twenty-one years of age in a penal institution;

(e) a child in care under this Act; or

(f) a child alleged to be in need of protection.

(3) [Appointment of guardian ad litem].--A court or a judge may appoint a guardian ad litem for a person defined in subsection (2) and may remove or substitute a guardian ad litem or make such other order as is in the best interest of the child.

(4) [Guardian ad litem to have no interest in proceeding].--A person who is appointed a guardian ad litem for a person under disability shall, before acting in a proceeding, file with the court or the judge who made the appointment a certificate that he has no interest in the proceeding adverse to that person.

(5) [Remuneration to guardian ad litem].--The Governor in Council may make regulations respecting the payment for services of a guardian ad litem.

EXPLANATION

That though an agency's role in a case should be to represent the best interests of the child, there are cases in which either a social worker or a lawyer may be able to present material to the court about the child's best interest that an agency or the child's parents are unable or unwilling to present. (See Yukon Act s. 122.)

RECOMMENDATION 84.

That legislation empower a judge to appoint a guardian ad litem to further the interests of a child at a hearing and in making such appointment shall chose a person with the skills most useful to the case at hand.

RECOMMENDATION 85.

That the existing s.56 be more clearly worded and that a court be given power to appoint either a social worker or lawyer as guardian as the facts require.

Sec. 86. [Return of child to person under disability].--(1) Notwithstanding that a person under disability is a parent and party to a proceeding, a judge may order that a child who is alleged to be in need of protection be returned to the care and custody of that person with or without conditions.

(2) [Order to be reviewed within one year].--Any order made pursuant to subsection (1) shall be reviewed by the judge within one year and upon such review the judge may vary the order and find that the child is in need of protection or renew the order.

Sec. 87. [Status of agent].--An agent

(a) may serve and execute any process issued under this Act and for the purposes of enforcing this Act shall have all the powers and authority of a peace officer; and

(b) where a person is required or authorized by law to execute a process or to carry out a process, he or any person who assists him is, if he acts in good faith, justified in executing the process or in carrying out the process on reasonable and probable grounds and notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess or jurisdiction.

EXPLANATION

Existing s. 56, 57, 58.

EXPLANATION

s. 58 of the existing Act confers on an agent the protection of the Constables Protection Act (R.S.N.S. c.50). In fact, as was pointed out, this protection is quite minimal. It only protects acts done pursuant to warrants, a relatively rare occurrence in child protection cases. It is appropriate to consider either strengthening s. 58 in a way similar to s. 25(2) of the Criminal Code or enacting the defence under s. 40 (16) of the Ontario Act. See also proposed s.103.

RECOMMENDATION 86.

That agents be given greater protection than that conferred by the Constables Protection Act (existing s. 58 of the present Children's Services Act). Such protection should conform more nearly to that conferred by s. 25(2) of the Criminal Code.

Sec. 88. [Hearing not to be in public].--(1) The place in which the hearing or proceeding under this Act takes place shall not be public court and no person shall be permitted to be present other than the officers of the court, the parties, their counsel and such other persons as the judge may require or permit to be present.

(2) [Confidentiality of persons involved].--No report of a hearing or proceeding under this Act in which the name of the child or his parent or guardian or in which the identify of the child is otherwise indicated shall be published, broadcast or otherwise made public by any person without the special leave of the judge.

Sec. 89. [Order to bring child before judge].--(1) The judge may order the person having care and custody of a child to bring the child before the judge at any time.

(2) [Offence].--Where a person, who is required by an order of the Family Court made pursuant to any enactment to do an act or abstain from doing an act in relation to custody of or access to a child, disobeys the order any Judge of the Family Court may enforce the order or punish for contempt of court in the same manner and following the same procedure as provided for such a case in the Supreme Court.

Sec. 90. [Amendment to notice of motion].--(1) A judge hearing evidence pursuant to Sections may on his own motion amend the grounds for taking a child into care as set out in the notice where it is in the interest of the child to do so, and make such order including adjournment as he deems proper under Section.

(2) [Written reasons of judge to be made available].--A judge making an order, judgment or rendering a decision under this Act shall give written reasons which shall be available to any party thereto.

Sec. 91. (1) [Evidence].--At any hearing under this Act including a hearing on an application for termination of the care and custody of an agency, the judge shall admit as evidence

(a) the record of the proceedings where the child or another child that was in the custody of one of the parties was found to be a child in need of protection;

EXPLANATION

Existing s. 59, 60, 61 and 62.

(b) evidence taken by a commissioner appointed by a judge to take the evidence of a witness.

(2) Upon the consent of the parties or upon application, the court may, having regard to the best interests of the child and the reliability of the statements of the child, make such order concerning the receipt of the child's statements as evidence as it considers appropriate and just, including

(a) the admission into evidence of our of court statements made by the child; and

(b) the determination of the persons, including parties, who may be present in the courtroom while the child is giving viva voce evidence.

Sec. 92. [Private agreement not binding upon judge or court].--Except where there has been an agreement to give up a child for adoption or where a child has been placed for adoption or as otherwise provided by this Act, any agreement entered into between the parent or parents, or guardian of the child and an agency pursuant to this Act, or any other agreement respecting the child shall not be binding upon the judge or the court in any proceedings under this Act, not shall it prohibit the parent, guardian, Minister or other persons from bringing proceedings under this Act.

Sec. 93. [Service of documents].--(1) Unless otherwise specified in this Act, the regulations or rules of court, all documents required to be served under this Act shall be served as ordered by the court or a judge thereof.

(2) [Substituted service].--Any order for substituted service shall be made by a judge.

(3) [Effecting substituted service].--Substituted service of any document in this Act is effected by taking such steps as the judge has ordered to bring the notice to the attention of the person to be served.

(4) [Service outside Province].--Service of documents outside the Province in accordance with the Family Court Rules shall be deemed to be proper service for the purposes of proceedings under this Act.

EXPLANATION

Existing Act s. 63-64.

Sec. 94. [Signing of documents].--Unless the contrary is proved, a document purporting to be signed by a judge or court officer shall be deemed to have been so signed without proof of the judicial or official character of the person appearing to have signed it and, unless the contrary is proved, the court officer by which a document is signed shall be deemed to be the proper officer of the court to sign the document.

Sec. 95. [Appearance in court of Minister or person designated by Minister].--The Minister may appear and be heard in a Family Court, a county court or the Supreme Court of Nova Scotia in respect to any matter arising in this Act.

EXPLANATION

Existing s. 63, 64, 65, 66 and s. 76A.

CUSTODY

Sec. 96. [Application for custody].--(1) a parent or other person authorized by a Judge (but not including an agency or facility) may make an application to a court for the custody of a child and a judge thereof shall conduct a hearing on the application and may order

(a) that the child shall be in or under the care and custody of the parent or any other person;

(b) the payment of maintenance for the child and the costs of the action; and

(c) access and visiting privileges.

(2) [Principles].--in making such order the court shall have regard to the principles expressed in ss 3-7 inclusive of this Act.

(3) [Report where Application].--When an application to which this Act applies has been made to the Court or a judge, the Court or judge may after hearing the parties request the Administrator of Family and Child Welfare to cause a written report to be made to the Court or judge respecting the infant and his parents, their circumstances and manner and conditions of living and any other matters relevant to the application.

(4) [Content of Report].--Such report shall contain the name of the author and the sources of the information therein.

(5) [Copies of Report].--A copy of the report for the sole use of each of the parties shall be delivered to the prothonotary or clerk of the court and to a judge of the Family Court.

(6) [Report Considered by Court].--The Court or judge, after hearing the parties respecting the report, may take it into consideration in dealing with the application.

EXPLANATION

Modified s. 67 of existing Children's Services Act.

The Provisions of the Act have been made as far as possible compatible with the Infants Custody Act to prevent problems of inconsistency.

EXPLANATION

The question of standing to bring proceedings is normally a question for a judge to determine not the Minister (see Divorce Act s. 15). If an agency has concerns it can place them before the court at that time. One agency wanted to be able to initiate proceedings under s. 67 to prevent mothers leaving a maternity home with their child if they were not able to cope with the child. It is suggested, however, that the maternity home may best resolve this problem by co-operating with a Children's Aid Society which has the power to make an agreement for Voluntary Care or apprehend.

RECOMMENDATION 87.

That a judge rather than Minister as under the existing 67 be empowered to grant standing to initiate custody proceedings.

RECOMMENDATION 88.

That for consistency the provisions of the Act be made consistent with the Infants Custody Act and the Family Maintenance Act.

(7) [Agreement Respecting Custody].--No agreement contained in any separation deed made between the father and mother of any infant shall be held to be invalid by reason only of its providing that the father of the infant shall give up the custody or control thereof to the mother; but such provision may be declared valid and may be enforced by the Court, provided always that the Court shall not enforce any such agreement if the Court is of opinion that it would not be for the benefit of the infant to give effect thereto.

(8) [Jurisdiction and Powers of Judge of Court].--The judge of each Family court shall have and exercise within his district in respect to the care and custody of infant children residing in his district or with respect to whom any application may be pending before the said judge under this Act, the same jurisdiction and powers as may be exercised by any Judge of the Trial Division of the Supreme Court, whether arising under the Liberty of the Subject Act or otherwise, and shall deal with all motions and proceedings on writs of habeas corpus where the care and custody of any such infant children are concerned according to the principles of equitable jurisprudence.

(9) [Judge may alter, vary or rescind order).--On the application of a parent or other person authorized by the Minister, a judge may alter, vary or rescind the order issued pursuant to subsection (1).

(10) [Notice of hearing].--Where an application is made pursuant to subsection (1) or subsection (2), the parent, parents or guardian of the child shall be served with notice of the hearing at least four clear days prior to the date of the hearing by personal service or as otherwise ordered by the judge.

(11) [Application of Divorce Act (Canada)].--Nothing in this Section authorizes the making of an application for or granting of an order relating to the custody or maintenance of a child in respect of whom an order for custody or maintenance has been made under the Divorce Act (Canada).

(12) [Order of judge where application pending].--Where an application is pending before a judge, the judge may order that the child be brought before the court at any time, and for this purpose the judge may make such order as he deems proper.

EXPLANATION

Subsection 13 (c) prevents the use of custody proceedings being used to impede an adoption placement.

RECOMMENDATION 89.

That the use of custody proceedings to impede an adoption placement be restricted in language similar to s. 53 of the existing Act.

(13) [Application of section].--This Section does not apply

(a) where there is an agreement for adoption pursuant to Section 17 or where a child has been placed for adoption; or

(b) to an application to terminate the care and custody of an agency

(c) where a person applying under this Act is not a concerned parent whose consent is required (or dispensed with) pursuant to s. 26(1) in order to relinquish a child for the purpose of adoption, and no application can be instituted under this section once a child has been placed and is residing in the home of a person who has given notice of the proposed adoption of the child under this Act until an adoption of the child under this Act until an adoption order is made under this Act or until the application for adoption is dismissed, discontinued or unduly delayed.

EXPLANATION

See previous page. s. 68(8) of the old Act is redundant in new of the definition of parent in s. 2(v).

SETTLEMENT

(NOTE: IT IS RECOMMENDED THAT THE EXISTING SETTLEMENT PROVISIONS IN THE EXISTING S. 68 BE DROPPED. THESE SECTIONS ARE ONLY NECESSARY IF THE AUTHORS RECOMMENDATION IS REJECTED.)

Sec. 97. [Determination as to whether child in need of protection].--Where a judge conducts a hearing to determine whether a child is a child in need of protection, he shall hear first the evidence and render a decision on that issue and then he shall determine the religion, if any, of the child, settlement and maintenance issues.

Sec. 98. [Notice of time and place of hearing].--(1) An agent who initiates any proceeding before a judge to determine whether a child is a child in need of protection, and where the child is not a child of an unmarried mother, shall give notice in writing of the time and place of the hearing to the clerk of the municipality in which the child is believed to have a settlement.

(2) [Adjournment].--Where the judge is of the opinion that the child is not a child of an unmarried mother or that the clerk of the municipality in which the child is believed to have a settlement has not received notice of the hearing he may, subject to Section 68, adjourn the hearing for a period not to exceed thirty days and order written notice be given to the clerk of the municipality in which the child is believed to have a settlement.

(3) [Place of settlement].--Where the judge is satisfied that the clerk of a municipality has received reasonable notice of the hearing, the place of settlement shall be deemed to be that municipality unless the clerk of the municipality appears and presents evidence to the contrary.

(4) [More than one notice].--where more than one clerk of a municipality is given notice of the hearing under this Section, the judge shall hear such evidence as he deems proper and determine the settlement of the child.

(5) [Date of settlement].--For the purposes of this Act, a judge shall determine the settlement that the child had

(a) on the date the child was taken into care; or

(b) on the date on which the hearing respecting the child was commenced in a case in which the child was not taken into care.

EXPLANATION

The 1987 Task Force p. 174 recommended (Recommendation 11.15) the abolition of the Settlement Act and the simplification of Municipal funding arrangements without substantially altering the financial responsibility of either party. The Department of Community Services and the Agencies support this now. The time and effort expended in implementing the provisions on settlement is out of proportion to the benefit derived. Nova Scotia is believed to be the only Province retaining the concept of settlement.

RECOMMENDATION 90.

That the settlement provisions of the Act be dropped and that a single per capita rate of municipal contribution towards the cost of providing children's service be established to reflect current total municipal expenditures in this area, and be subject to an annual cost of living revision by the Executive Council.

(6) [Notice to municipality of judge's finding].--After making a finding respecting settlement and where the city, town or municipality is liable to make payments pursuant to the regulations, the judge shall forthwith transmit by personal service or by registered mail to the Minister and to the clerk of the municipality in which the child is found to have a settlement a

APPEALS

Sec. 99. [Appeal lies to county court].--(1) An appeal lies to the county court from any decision, judgment or order of a court or a judge thereof.

(2) [Evidence not be reheard].--the county court shall not rehear the evidence on an appeal but shall consider the record from the court.

(3) [Appeal by way of trail de novo].--Notwithstanding subsection (2), where, because of the condition of the record or for any other reason, the county court, upon application, is of the opinion that the best interest of the child would be better served by hearing and determining the appeal by holding a trial de novo, the county court may order that the appeal shall be heard by way of trial de novo.

(4) Where it is necessary for a court hearing an appeal in order to make a proper disposition of a case without remitting the matter back to family court to take further evidence, a judge or the court at the conclusion of the case may on his or its own initiative call for the introduction of such evidence.

(5) Any appeal shall be heard within 3 months of the filing of a notice of appeal.

Sec. 100. [Appeal from county court].--An appeal lies to the Appeal Division of the Supreme Court from any decision, judgment or order of a county court, or of a judge thereof, made in court or at chambers.

(5) Any appeal shall be heard with 3 months of a filing of a notice of appeal.

Sec. 101. [Statement of case for opinion of Appeal Division of Supreme Court].--(1) The court may of its own motion or upon the application of any party, and upon such security being given as the court directs, state a case in writing for the opinion of the Appeal Division of the Supreme Court upon any question which in the opinion of the court is a question of law.

(2) [Determination of Appeal Division of Supreme Court].--The Appeal Division of the Supreme Court shall hear and determine the question or questions of law arising thereon within 3 months of the filing of the notice of appeal and remit the matter to the court with its opinion.

EXPLANATION

s. 72 of the existing act is obsolete in view of the repeal of the Juvenile Delinquents Act. Existing ss. 73, 74, 75 save that appeals under this Act should be given priority over other appeals and heard within 3 months.

RECOMMENDATION 91.

That all appeals under this Act (or further appeals be heard within 3 months of the filing of a notice of appeal).

EXPLANATION

If an appeal court hearing an appeal in a child protection case is minded to make a different order than the court below in the exercise of its legal powers it is restricted to the evidence existing at the time of the trial. Since many months may have elapsed between the time of trial and the appeal and since evidence as to the current progress of the child may be essential to the proper discharge of the judge's decision making power some mechanism for avoiding remitting the matter back to the family court, with the duplication of effort and further loss of time involved seems desirable. It should be possible to allow the judge at his discretion at the end of the evidence to call for evidence relevant to events occurring after the time of trial and which is relevant to the disposition the court is considering making. It should not be open to the parties to adduce this evidence since in many cases it will be either unnecessary or will unnecessarily prolong the trail.

RECOMMENDATION 92.

That were it is necessary for a judge hearing an appeal to call for evidence relating to facts occurring after the time of the trial in order for the judge to make a proper disposition in a case without remitting the matter back to Family Court, the judge on his own initiative may call for such evidence.

GENERAL

Sec. 102. A decision in any case whether initial trial, or appeal pursuant to s. 99, 100, or 101 shall be delivered with 60 days of the last day hearing or the date of submission of material by Counsel if later.

Sec. 103. [Protection from personal liability].--No action shall be instituted against a child protection worker or peace officer for any act done in accordance with this section, unless the act is done maliciously or without reasonable grounds.

Sec. 104. [Inducing a child to leave care].--Any person

(a) who induces or attempts to induce a child in care to leave a child care facility;

(b) who knowingly or wilfully obstructs an agent or agency in the discharge of a duty in carrying out this Act; or

(c) who detains or harbors a child in care not placed with him by an agency,

shall be guilty of an offence under this Act.

Sec. 105. [Duty of peace officers].--It shall be the duty of all peace officers to assist agents in carrying out this Act.

Sec. 106. (1) [Removal of child from Province].--(1) No person shall taken or attempt to take any child under the age of twelve years who is a resident of or was born in the Province out of the Province for the purpose of being adopted or brought up outside of the Province unless the person is in possession of a certificate issued by the Minister under this Section except

(a) where a child is being taken by a natural or adoptive parent or being taken to reside with a natural or adoptive parent; or

(b) where the child is the legitimate child of the person taking the child.

(c) where the child is related by blood or marriage to the mother or father.

(2) For the purpose of s. 106(1) the following persons are considered to be related by blood or marriage to the mother or father referred to in Section 106(1).

EXPLANATION

Existing s. 78, 79 and 80 except that s. 76 and 77 appeal earlier as sections 6 & 40 of this Act.

RECOMMENDATION 93.

That legislation require decisions in cases for error by this Act to be given within 60 days of the last day of hearing or submission of material by counsel, if later.

RECOMMENDATION 94.

That a form of protection for social workers similar to that found in s. 40(16) of the Ontario Act be enacted. This should cover all social workers and peace officers and adds to the production conferred on agents by a 87.

RECOMMENDATION 95.

That the exemption from the need for a requirement of an exit permit under s. 80 of the existing Act be extended to blood relatives.

> The father, mother, son, daughter, grandfather, grandmother, uncle, aunt, nephew, niece, brother and sister of the mother or the father referred to in Section 87(1) or first cousin of the Act; and the father, mother, son, daughter, grandfather, grandmother, uncle, aunt, nephew, niece, brother and sister of the spouse of a person referred to in Section 87(1) of the Act.

(3) [Appeal pursuant to subs. (1)].--There shall be an appeal to the court from the refusal of the Minister to grant a certificate pursuant to subsection (1).

(4) [Notice of appeal].--Notice of the appeal shall be given to the Minister within thirty days of the refusal or within such further period as the court may allow and upon such notice the Minister shall forward to the court his complete record of the case and either party to the appeal may give evidence himself and call witnesses.

(5) [Hearing].--The court shall conduct a hearing into the matter and cause to be made such further inquiries as it deems necessary, and may confirm the refusal of the Minister or direct the Minister to issue a certificate.

Sec. 107. [Order made outside Province].--Where an order has been made by a court of competent jurisdiction in another province or territory of Canada under provisions that are similar in effect to this Act, the order has the same force and effect in the Province as an order made under this Act unless a Judge of the Supreme Court otherwise orders.

Sec. 108. [Offence].--Every one who violates this Act or the relations is guilty of an offence punishable on summary conviction and, unless a penalty is provided elsewhere in this Act, is liable is a fine of not more than one thousand dollars or to imprisonment for not more than one year, or both.

Sec. 109. [Delegation of powers and duties by Minister].--(1) The Minister is charged with the general administration of this Act and may from time to time designate in writing any person to have, perform and exercise any of the powers, privileges, duties and function of the Minister under this Act, and shall, when so designating, specify the powers, privileges, duties and functions to be had, performed and exercised by the person so designated.

(2) Idem.--A person designated pursuant to subsection (1) shall in addition perform such duties as the Governor in Council or the Minister prescribes.

Existing Act. s. 81-84.

Sec. 110. [Appointments pursuant to Civil Service Act].--(1) There may be appointed by the Minister, in accordance with the Civil Service Act, Directors or such other persons as he may designate to carry out duties in accordance with this Act and the regulations.

(2) [Execution of documents by Director].--When an appointment is made pursuant to subsection (1) and the Director to whom the appointment is made signs or executes any documents in exercise of a power or function conferred upon him by this Section, he shall refer to the name of his office together with the words "Authorized under Section __ of the Children's Services Act" and when a document contains such reference, the document

(a) shall be received in evidence without further proof of the authority of the Director who signs or executes the same; and

(b) may be relied upon by the person to whom the document is directed or given and by all other persons as an effective exercise of the power or function to which the document relates.

Sec. 111. [Powers of Minister].--The Minister shall have throughout the Province all the powers and privileges of a Society.

Sec. 112. [Minister may appoint agents].--The Minister may appoint agents of the Minister within the meaning of this Act.

Sec. 113. [Minister to make payments in respect of child care services].--The Minister may make payments in respect of child care services, child caring facilities and child placing agencies in such amounts as are determined by the Governor in Council out of the amount appropriated annually for these purposes.

RECOMMENDATION 96.

That s. 86 of the existing Act be deleted as obsolete after the Young Offenders Act.

Sec. 114. [Governor in Council may make regulations].--(1) The Governor in Council may make regulations:

(a) respecting the qualifications, appointment and duties of agents of the Minister and of a Society;

(b) defining any word or expression used in this Act not defined in this Act;

(c) respecting standards and procedures for the licensing or approving, evaluation, inspection, suspension and cancellation of child care services, child caring facilities and child placing agencies;

(d) respecting the provision of services for persons sixteen years of age or older but under the age of twenty-one years where a parent is unwilling to provide for that person or the child in care requires services or placement;

(e) respecting procedures and conditions for the admission to or discharge from a child caring facility of a mentally retarded child;

(f) respecting the conditions under which a foster home is deemed approved by the Minister;

(g) respecting the establishment of procedures for communication between natural parents and adoptive children or children in care;

(h) prescribing the duties and responsibilities of the court officer;

(i) prescribing the nature of matters to be recorded and procedures for the child abuse register;

(j) prescribing the procedure governing the release of information from the Child Abuse register.

(k) respecting the form and procedure for reporting and investigating a report a child allegedly in need of protection;

(l) respecting the form and procedure for an agreement for voluntary care between a parent or guardian and an agency;

(m) respecting the forwarding and retention of all written documentation pertaining to adoption and other services;

(n) respecting the payment of a guardian ad litem;

RECOMMENDATION 97.

That a regulation making power in relation to the release of information from the Central Child Abuse Register be added in conformity with s.44 of the proposed Act.

(o) defining the duties and responsibilities of Directors appointed under this Act;

(p) providing for the payment by the Minister of Societies, child caring facilities and child placing agencies for services performed by them and prescribing the conditions and procedures under which such payments are to be made;

(q) respecting the payments by the place of settlement for taking a child into care, for a child in care or for a child in a child caring facility;

(r) respecting the costs of taking a child into care, and the maintenance of a child in care;

(s) respecting the placement of children in care in child caring facilities or with their parents;

(t) respecting the transfer of children in care;

(u) respecting rules of court;

(v) respecting forms and contents of notices to be used under this Act;

(w) respecting any matter necessary or advisable to carry out effectively the intent and purposes of this Act.

(x) prescribing the manner in which information, whether identifying or not is released in relation to adopted persons.

(y) prescribing the procedures for informing the Department of Indian Affairs concerning the adoption of a status Native Indian Person.

(z) prescribing rules and procedures for the mediation of disputes.

(aa) prescribing the content of agreements for voluntary care.

(bb) prescribing the procedure governing hearings to authorize a consent to medical treatment under s. 64.

RECOMMENDATION 98.

That regulation making powers relating to the release of information relating to adopted persons be added, governing mediation and the content of agreements for voluntary care.

SOCIETIES

Sec. 115. [Formation of societies].--When not fewer than ten persons form themselves into a Society having among its objects the provision of help for those children within the family whose parents are unable to care for them and, where necessary, to provide suitable alternate care for those children whose parents fail to provide the basic needs of their children, or who violate their children's basic right,s or who abuse their children or who evade their parental responsibility with respect to their children, and file with the Registrar of Joint Stock Companies a constitution and by-laws and the Governor in Council approves the constitution and by-laws, those persons and any others who are or become associated with them in accordance wit the terms of the constitution and by-laws shall be a body corporate under the name of "The Children's Aid Society of ....", or "Family and Children's Services of ....", as the Governor in Council approves.

Sec. 116. [Powers of societies].--In addition to the powers set out in its constitution or otherwise conferred upon it, every Society shall have power

(a) with the approval of the Governor in Council to amend its constitution;

(b) with the approval of the Governor in Council to change its name;

(c) with the approval of the Minister to make and amend by-laws for the conduct and management of its affairs;

(d) with the approval of the Minister to appoint an agent or agents;

(e) to engage such persons as may be necessary for carrying on its affairs; and

(f) to do such other acts and things as may be convenient or necessary for the attainment of its objects and the exercise of its powers.

Sec. 117. [Jurisdiction].--The Governor in Council may from time to time prescribe the territorial jurisdiction of any Society incorporated pursuant to this Act.

EXPLANATION

Existing Act s. 89, 90, & 91.

Sec. 118. [Bond].--(1) Before entering upon or performing the duties of his office the signing officer of every Society shall give a bond to Her Majesty in the Right of Her Province of Nova Scotia in the same manner as a public officer within the meaning of the Public Officers Act and such bond may be enforced as if it were a bond given under that Act.

(2) [Books and records].--The Minister may examine and audit the records, books and accounts of any Society.

Sec. 119. [Governor in Council may revoke permission of Society to function].--(1) The Governor in Council may by order declare that on or after a day to be named therein a Society shall not be permitted to accept the care and custody of children in need of protection.

(2) [Children to be returned to care of Minister].--When an order has been made under subsection (1), no judge after the effective date of the order shall order that a c child in need of protection shall be subject to the supervision of or be committed to the care and custody of the Society to which the order relates, and all children who before the effective date of the order have been placed under the supervision of or committed to the care and custody of the Society shall be under the supervision, or the care and custody, of the Minister to the same extent and in all respects as though they had originally been placed under his supervision or committed to his care and custody, and the Society shall deliver to the Minister all papers and documents in its custody relating to such children.

Sec. 120. [Payments to Societies].--(1) A municipality may pay annually to a Society having Territorial jurisdiction within the municipality such sums as the council of the municipality may fix as a contribution toward the general expenses of the Society.

(2) [Collection of money required by municipality].--Any sum required by a municipality for the purposes of this Section shall be raised, levied and collected in the same manner in all respects as other sums required for the ordinary lawful purposes of the municipality are raised, levied and collected.

(3) [Personnel expenses].--To assist in defraying the costs of workers' salaries and travelling expenses for the provision of protection services as defined in the regulations, every municipality shall pay annually,

EXPLANATION

Existing Act. s. 93 & 94.

(a) to a Society having jurisdiction within the municipality, an amount equal to thirty cents per capita of population of the municipality of such other amount as may be determined from time to time by the Governor in Council after consultation between the Minister and the Union of Nova Scotia Municipalities; or

(b) to the Minister, if there is no Society having jurisdiction with the municipality, an amount equal to thirty cents per capita of population of the municipality or such another amount as may be determined from time to time by the Governor in Council after consultation between the Minister and the Union of Nova Scotia Municipalities.

(4) [Determination of population of municipality].--For the purposes of subsection (3) the population of a municipality shall be the population as determined by Statistics Canada in the decennial census of Canada or in an intercensal census, as the case may be, last completed before the year in which the payment is to be made.

EXISTING ACT

S. 94.

REPEALS

Sec. 121 [Repeals]. The Children's Services Act being Chapter 8 of the Statutes of Nova Scotia 1976, as amended, is hereby repealed.

INTERPRETATION

Sec. 122. [References to age].--In this Act, references to persons who have not attained the age of twenty-one years shall be so construed notwithstanding the provisions of the Age of Majority Act.

TRANSITIONAL

Sec. 123. All matters commenced under the Children's Services Act, being Chapter 8 of the Statutes of Nova Scotia 1976, as amended, shall be continued under that Act as if it had not been repealed save that any application to terminate or vary an order made under the Children's Services Act which is initiated after the coming into force of this Act shall be dealt with under the corresponding provisions of this Act.

COMMENCEMENT

Sec. 124.--This Act comes into force on and not before such day as the Governor in Council orders and declares by proclamation and different sections may be brought into force on different appointed days.

RECOMMENDATION 99.

That different sections be able to come into force on different days to facilitate provisions such as s. 15 which involve agreements with older children (which may have resource implications) or those which require the drafting of regulations to make them effective.

RECOMMENDATIONS

RECOMMENDATION 1.

The title of the Act should be the "Children and Family Services Act" the purpose is to emphasize the role of the Family to Society.

RECOMMENDATION 2.

That a preamble similar to that found in the New Brunswick Act be adopted with the addition of a clause respecting the child's sense of time.

RECOMMENDATION 3.

The definitions of "child in need of protective services" and "parent" are tightened to comply with the Charter or Rights and Freedoms. The change from 'child in need of protection' to 'child in need of protective services' is based on the Alberta Act and emphasized the need of the child for protective services. All children are worthy of protection.

RECOMMENDATION 4.

That a provision similar to s. 118(2) of the Yukon Act be adopted to declare that the mere infliction of reasonable corporal punishment does not of itself make a child in need of protective services.

RECOMMENDATION 5.

That the Act develop, as did the Yukon Act s. 106, a concept of concerned parents who would be involved in proceedings relating to their children, rather than rely on the concept of legitimacy.

RECOMMENDATION 6.

That, subject to resource implications, the jurisdiction in adoption be shared concurrently between the Family and County Courts.

RECOMMENDATION 7.

that "hearing" be newly defined to fill a gap after Family and Children's Services of Kings County v. D.(E). (1988) 12 R.F.L.. (3d) 104 (N.S.C.A.).

RECOMMENDATION 8.

That instead of the rights of a parent on whether the child is legitimate or illegitimate, that biological parents be entitled to parental rights PROVIDED that they have shown that they are a concerned parent. See also RECOMMENDATION 5.

RECOMMENDATION 9.

That substantive provisions include a statement of the basis on which services are extended to families and the placement policy to be followed if children come into care.

RECOMMENDATION 10.

That S. 76 of the present Act be brought forward in view of its importance, and that the factors constituting the best interest of the child be specified as per s. 132(1) of the Yukon Children's Act.

RECOMMENDATION 11.

That the best interest of the child be defined in terms similar to s. 132(1) of the Yukon Children's Act in order to give greater guidance to the courts.

RECOMMENDATION 12.

That the legislation emphasized the responsibilities as well as the rights of parenthood.

RECOMMENDATION 13.

That an Advisory Committee should be created to continually monitor the Act so that any successor in title to the author does not have to play 12 years catch up.

RECOMMENDATION 14.

That legislation specifically indicate the services which the Department may offer (where possible) to a parent or guardian to keep a child in its own home and in order to diminish the need to take children into care.

RECOMMENDATION 15.

That the legislation more fully describes and defines the content and obligations (whether legally or morally enforceable) of a voluntary agreement and temporary help extended outside the child's own home.

RECOMMENDATION 16.

That binding agreements between parents, children over 16 and Agencies be permitted.

RECOMMENDATION 17.

That concerned parents should be given rights under the provisions relating to relinquishment for adoption and that enabling provisions be adopted to enable biological fathers to relinquish children for adoption.

Fathers who have not yet had the chance to exhibit their concern should be given a limited right to apply for custody of their new born child but not in a way that would significantly impede the adoption process. This provision should be read in the context of amendments to the custody.

S. 16 is based on the old section 10 but involves concerned parents and an enabling provision to permit biological fathers to enter into agreements to relinquish children for adoption.

RECOMMENDATION 18.

That s. 17(5) clarify an agency's legal authority to look after a child relinquished for adoption. The agency's authority should be similar to that conferred by s. 15 of the existing Children's Services Act.

RECOMMENDATION 19.

That enabling provisions be enacted to permit joint applications to adopt from people who agencies determine (according to their own policy) are suitable adopters.

RECOMMENDATION 20.

That s. 21(1) be amended to implement the notice requirements in relation to Private Adoptions recommended by the 1987 Task Force. (Recommendation 8.8, p. 111 of the Task Force Report.)

RECOMMENDATION 21.

That subsidized adoption in an enabling, but not mandatory form, be given statutory recognition. This implements recommendation 8.3 of the 1987 Task Force in a form based on s. 99(1) of the Yukon Act.

RECOMMENDATION 22.

That prior approval of homes whose third party placements be required in accordance with Task Force Recommendation 8.8.

RECOMMENDATION 23.

That payment of money (or its receipt) for the surrender of parental rights or care or custody or a child be made an offence.

RECOMMENDATION 23A.

That Reg. 3A should be amended to include first cousins within the definition of a person related to the mother or father by blood or marriage.

RECOMMENDATION 24.

That, if the Chief Family Court Judge determines that the court can accept the work within its existing work load, the family court be given concurrent jurisdiction over adoption.

RECOMMENDATION 25.

That concerned parents' consent be required for the adoption of their children and that biological fathers who have registered their names be permitted to launch custody proceeding with a limited hope.

RECOMMENDATION 26.

That legislation make it clear that the consent of the Minister or of an Agency in relation to adoption be restricted to cases where the agency has the care and custody but not care or temporary care and custody of a child.

RECOMMENDATION 27.

That the Department of Community Services be not asked to prepare adoption reports where the adoption is a natural parent of a child unless a consent required under the Act has not been obtained.

RECOMMENDATION 28.

That a procedure be introduced by which a judge could treat an adoption application by a step-parent as a custody application if this would be more appropriate. If successful, the step-parent could be shared custodial rights along with the custodial parent.

RECOMMENDATION 29.

That provisions be inserted into the Act to preserve the rights of Indian children under the Indian Act who are adopted into non-Indian homes.

RECOMMENDATION 30.

That words similar to the last words of s. 31(3) be inserted to confirm the Supreme Court of Canada decision in National Parents v Supt of Child Welfare. [1976] S.C.R. 751 and reflect concerns of Mic Mac Social Services.

RECOMMENDATION 31.

That provision be made for releasing information about adopted children (either a passive or active register) in accordance with regulations made under the Act.

RECOMMENDATION 32.

That provision be made for the Minister to inform the Department of Indian and Northern Affairs of the adoption of a status Indian child so that the child's Indian rights (which are not extinguished by adoption) are maintained.

RECOMMENDATION 33.

That the defence under s. 77(2) of the existing Act be as wide as the duty to report created by s. 77(1).

RECOMMENDATION 34.

That the duty of professional persons to report that a "child is in need of protective services be wider than that imposed on the general public and the penalties made more severe than those imposed on the general public.

RECOMMENDATION 35.

That the definition of what abuse that the public has to report be clarified by the use of the definition in the existing regulations to the Act.

RECOMMENDATION 36.

That no procedure for introducing third party interrogations be introduced prior to proceedings being introduced.

RECOMMENDATION 37.

That s. be reviewed to see whether it needs strengthening in the light of the explanation above and that, in any event, agents or agencies be authorized to lay charges. If such monitoring reveals that the Act needs strengthening a new subsection be added. "Proceedings under subsection three may be instituted either by an agent or agency duly appointed or authorized under this Act."

RECOMMENDATION 38.

That registration on the Child Abuse Register be possible in the case of third parties who are not caregivers of a child. (1987 Task Force p. 189).

RECOMMENDATION 39.

That third parties (i.e., non-caregivers of a child) who are convicted of an offence mentioned in the schedule, shall have that conviction forwarded by Crown Counsel in a manner prescribed by regulations to the Child Abuse Register.

RECOMMENDATION 40.

That where a caregiver of a child has been found by a family court judge to have been guilty of child abuse as defined in the regulations, the judge shall make a finding against such person and the agency responsible for the case shall in the manner provided in the regulations report the finding to the Administrator of the Child Abuse Register.

RECOMMENDATION 41.

In any case not covered by the previous two recommendations in which an agency seeks to have a person's name removed from the Child Abuse Register, the agency may institute proceedings before a family court judge to have the alleged abuser's name removed.

RECOMMENDATION 42.

That the procedures relating to the removal of a name from the Child Abuse Register be tightened both as to training and the criteria for removal of a name from the register.

RECOMMENDATION 43.

That legislation permit a joint application for mediation by or/an agency and parent or guardian.

RECOMMENDATION 44.

That no lesser standard for court ordered intervention be introduced below that of a "child in need of protective services" although a mediation mechanism be instituted to try to help reach voluntary agreements and to prevent children from becoming in the future in need of protective services.

RECOMMENDATION 45.

That an improved procedure to establish whether a child is in need of protection be created, without removing the child from its home.

RECOMMENDATION 46.

That the time for a first hearing not be reduced below 12 clear days unless additional extra judges be appointed.

RECOMMENDATION 47.

That under this procedure the parents retain parental rights unless a court on application orders that temporary care and custody be transferred to an Agency.

RECOMMENDATION 48.

That a first hearing dealing with orders for assessments and temporary care and custody be held within 12 days and the protection hearing commenced within 2 months from that date unless a judge otherwise orders and indicates in writing why this is in the best interest of a child.

RECOMMENDATION 49.

That a court be empowered to make orders for the payment of assessments or examinations as it deems proper.

RECOMMENDATION 50.

That legislation provide that where a child appears to be a native Indian child, an agency shall, in the manner described in regulations inform Micmac Family and Children's Services.

RECOMMENDATION 51.

That the initial hearing in a case in which a child is alleged to be in need of protective services should be held within 12 clear days of the service of the notice of hearing on the parent or guardian, and that at such initial hearing the court shall determine whether any assessments or examinations of the parent, guardian or child should be ordered or whether the child should receive medical treatment. In addition, the court should determine whether the parents retain full parental rights or merely care, in which case temporary care and custody should pass to the agency.

RECOMMENDATION 52.

That legislation prescribe that the hearing of whether a child was in need of protective services should be held within two months (or such longer period as is fixed by the judge) of the initial hearing.

RECOMMENDATION 53.

That legislation specifically refer to a place of safety in which children found "wandering" or temporarily in need of care and custody can be held pending return to their parent, guardian or other lawful caregiver provided that this can be done within 24 hours and without significant risk to the child. In such a case no proceedings need be initiated.

RECOMMENDATION 54.

That the use of s. 46 (taking into care and custody without warrant) be monitored to see whether it is being too widely used, when proceedings under s. 43 would constitute a satisfactory alternative.

RECOMMENDATION 55.

That s. 45(3) be clarified by the addition of the words underlined so that a peace officer can return a child to a foster parent caring for a child on behalf of an agency or any person entitled to the custody of the child under court order.

RECOMMENDATION 56.

That no procedure less onerous than the existing s. 46 be introduced to enable an agent to enter a child's home to gather evidence.

RECOMMENDATION 57.

That where a child apparently in need of protective services appears to be an Indian Child the agency concerned shall inform MicMac Social Services (see also p. 84 ante).

RECOMMENDATION 58.

That first hearings be heard within 12 clear days and this period only be reduced if extra judges are appointed.

RECOMMENDATION 59.

That full disclosure of allegations concerning why a child is alleged to be in need of protective services be given to the parents or guardians but that a technical failure to comply will not lead to the court losing jurisdiction.

RECOMMENDATION 60.

That provisions similar to s. 39(3) of the Ontario Act be implemented.

RECOMMENDATION 61.

That after the Dawson case, s. 58 clarify the purpose and powers of the initial hearing in an apprehension case and what are the court's powers. This is based on a combination of 123(5), (6), (7) and (8) of the Yukon Act and Bill 81, s. 49A.

RECOMMENDATION 61A.

That Agencies be not able to object to adjournments of more than 30 days since the benefit was intended to accrue to private individuals on whom unsought adjournments may most heavily impact.

RECOMMENDATION 62.

That the word substantial risk in s. 49A(3) of the existing Act be replaced in subsection 9 with either "significant risk" or "a risk unacceptable in the circumstances."

RECOMMENDATION 63.

That no power to order treatment of a parent or guardian be given to the court in the initial hearing or an apprehension matter.

RECOMMENDATION 64.

That legislation require that the main "protection hearing" be held within two months with a limited exception allowing for an extension in the best interests of the child based on s. 123(8) and (9) of the Yukon Act.

RECOMMENDATION 65.

That the time at which a finding that a child is in need of protective services is relevant be clarified.

RECOMMENDATION 66.

That an expanded range of options including a limited form of the temporary care and custody be introduced and made available to the court.

RECOMMENDATION 67.

That included in the expanded range of orders be a limited form of temporary care and custody.

RECOMMENDATION 68.

That a court be granted power to order a temporary payment of social assistance at the usual rate in order to secure custody of his or her child where the shelter allowance is essential to secure the housing necessary for a parent or guardian who is otherwise fit to have custody.

RECOMMENDATION 69.

That termination of parental rights by making an order for child custody of an agency be seen as a last resort only to be made where other alternatives would expose the child to unacceptable risks to his or her health (including mental health) safety or emotional development. It is not intended that no order can be made until a less intrusive order has been first tried.

RECOMMENDATION 70.

That out of an abundance of caution it should be made clear that court has power to deal with a case even where a child is not before the court or his or her presence is unknown.

RECOMMENDATION 71.

That legislation introduce a graded system of lengths of period in which a child can be in care under a court order related to the age of the child. An exception should provide for extensions in exceptional cases.

RECOMMENDATION 72.

That the criteria relevant to the best interests of the child be spelled out in legislation in a form similar to s. 132 of the Yukon Act.

RECOMMENDATION 73.

Since cases involving refusal of parental consent to medical treatment do not necessarily involved cases in which parental fitness are an issue except to the limited extent of consent to medical treatment, the provision should be in a separate section of the Act from cases involved other allegation of need for child protection proceedings. (2) An Order, if granted, would only deprive parents of such parental rights as would be necessary to ensure proper treatment of the child. (3) It may, however, be necessary to retain a "child in need of protective services" provision where parental consent is withheld for reasons unconnected with conscience.

In view of the LITTLE decision, the provision should be modeled closely on the (Yukon or Alberta) Acts and provide, where possible for the (4) authorization for medical treatment to come from a Judge rather than the Director of a Children's Aid Society or similar functionary. Teleconferencing provisions should be provided in the Statute to facilitate an early hearing.

RECOMMENDATION 74.

That in any case in which a child is in need of urgently needed treatment which is (i) essential to the child's life or health; (ii) in which the parents refuse to consent to; and (iii) in a case in which the Children's Aid Society or similar society refuses to take the matter before a Family Court Judge as soon as practicable (or in any case within twenty-four hours) after receiving notice (whether orally or in writing to this effect) from the child's doctor, that a hospital designated by Order in Council be granted standing to immediately take the matter before a Family Court Judge to get an Order authorizing the treatment of the child and restricting the parents' right to interfere with such treatment.

RECOMMENDATION 75.

That for the avoidance of doubt, a residual subsection in the provisions relating to medical consents involving children whose parents withhold consent to treatment be included, stating that in any case in which recourse to the provisions for obtaining Judicial authorization to treatment are impractical, having regard to the urgency of the occasion, that a doctor who performs non-negligent treatment in accordance with normal and acceptable medical practice shall be free from any liability for such treatment.

RECOMMENDATION 76.

That transfers of care and temporary care and custody between agencies should be possible before any court order is made.

RECOMMENDATION 77.

That agencies and parents or guardians may agree in a legally binding agreement that a child shall not be placed for adoption after the making of an order for care and custody in favour of an agency, either party to such agreement may make application to the court to have the agreement to be held to be legally binding.

RECOMMENDATION 78.

That where a member of a child's extended family wishes to seek care and custody of a child already in the care and custody of an agency he or she should be able to seek termination of the order for care and custody in favour of the agency.

RECOMMENDATION 79.

That an older child (over 14) with the permission of the Agency having care and custody of him or her should be able to seek termination of the Agency's order.

RECOMMENDATION 80.

That provisions be made for maintaining contact between siblings who are in separate placements but only where no adoption has occurred or seems like to occur.

RECOMMENDATION 81.

In order to discharge the placement policies and release of information provisions of the Act legislation should require a judge to inquire into the race of any child committed to the care and custody of an agency.

RECOMMENDATION 82.

That the existing s. 55 be amended to allow a challenge where it is alleged that the Minister's Consent is being unreasonably withheld.

RECOMMENDATION 83.

That the wording of the existing s. 55 be amended to delete the word repeatedly before unmanageable) and that the test for making an order be rephrased to concentrate on the risk to the child or others of the circumstances leading to the alleged need for the order. [Recommendation based on suggestions of Department of Community Services and several Agencies].

RECOMMENDATION 84.

That legislation empower a judge to appoint a guardian ad litem to further the interests of a child at a hearing and in making such appointment shall chose a person with the skills most useful to the case at hand.

RECOMMENDATION 85.

That the existing s.56 be more clearly worded and that a court be given power to appoint either a social worker or lawyer as guardian as the facts require.

RECOMMENDATION 86.

That agents be given greater protection than that conferred by the Constables Protection Act (existing s. 58 of the present Children's Services Act). Such protection should conform more nearly to that conferred by s. 25(2) of the Criminal Code.

RECOMMENDATION 87.

That a judge rather than Minister as sender the existing 67 be empowered to grant standing to initiate custody proceedings.

RECOMMENDATION 88.

That for consistency the provisions of the Act be made consistent with the Infants Custody Act and the Family Maintenance Act.

RECOMMENDATION 89.

That the use of custody proceedings to impede an adoption placement be restricted in language similar to s. 53 of the existing Act.

RECOMMENDATION 90.

That the settlement provisions of the Act be dropped and that a single per capita rate of municipal contribution towards the cost of providing children's service be established to reflect current total municipal expenditures in this area, and be subject to an annual cost of living revision by the Executive Council.

RECOMMENDATION 91.

That all appeals under this Act (or further appeals be heard within 3 months of the filing of a notice of appeal).

RECOMMENDATION 92.

That were it is necessary for a judge hearing an appeal to call for evidence relating to facts occurring after the time of the trial in order for the judge to make a proper disposition in a case without remitting the matter back to Family Court, the judge on his own initiative may call for such evidence.

RECOMMENDATION 93.

That legislation require decisions in cases for error by this Act to be given within 60 days of the last day of hearing or submission of material by counsel, if later.

RECOMMENDATION 94.

That a form of protection for social workers similar to that found in s. 40(16) of the Ontario Act be enacted. This should cover all social workers and peace officers and adds to the production conferred an ? by s. 67.

RECOMMENDATION 95.

That the exemption from the need for a requirement of an exit permit under s. 80 of the existing Act be extended to blood relatives.

RECOMMENDATION 96.

That s. 86 of the existing Act be deleted as obsolete after the Young Offenders Act.

RECOMMENDATION 97.

That a regulation making power in relation to the release of information from the Central Child Abuse Register be added in conformity with s.44 of the proposed Act.

RECOMMENDATION 98.

That regulation making powers relating to the release of information relating to adopted persons be added, governing mediation and the content of agreements for voluntary care.

RECOMMENDATION 99.

That different sections be able to come into force on different days to facilitate provisions such as s. 15 which involve agreements with older children (which may have resource implications) or those which require the drafting of regulations to make them effective.